TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 201.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARY TAYLOR, ADMINISTRATRIX IN SUCCESSION OF THE ESTATE OF GEORGE W. TAYLOR, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED JANUARY 15, 1907.

(20,530.)

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1 *Caption.*

In the Crawford Circuit Court, June Term, 1904.

Pleas Before the Honorable J. H. Evans, Judge of the Crawford Circuit Court, on the 1st Day of July, 1904.

Parties Litigant.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

2 *Complaint.*

In the Crawford Circuit Court, June Term, A. D. 1899.

JONATHAN NEAL, as Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Complaint at Law.

Comes the plaintiff Jonathan Neal, as administrator of the estate of George W. Taylor, deceased, and for his cause of action against the defendant St. Louis Iron Mountain & Southern Railway Company says: That on the 21st day of February, 1899, the probate court of Crawford County, Arkansas, granted him letters of administration upon the estate of George W. Taylor, deceased; and that he is now duly qualified and acting administrator upon said estate; that the said defendant is the owner, in possession of, managing operating and controlling a line of railway, engaged in interstate traffic, extending from the City of Van Buren, Arkansas, through and across the Indian Territory, to the City of Coffeyville, Kansas. That the town of Sallisaw, Indian Territory, is upon said line of railway; that the plaintiff's intestate, Geo. W. Taylor was on the 3rd day of May, 1892, a citizen and resident of Van Buren, Crawford County, Arkansas, and remained such until the date of his death. That on said 3rd day of May, 1892, plaintiff's intestate entered into a contract with the defendant at Van Buren, Arkansas, for the performance of duties as brakeman, upon defendant's trains running from Van Buren, Arkansas, through the Indian Territory to Coffeyville, Kansas.

That plaintiff's cause of action arises under an act of Congress, and in the trial of said cause there will be a controversy as to the construction of said act of Congress.

3 That on the 18th day of January 1899, the defendant disregarding its duty to plaintiff's intestate, maintained and equipped two of the freight cars in one of its west bound freight trains in so negligent, wrongful, improper, defective and unsafe condition that plaintiff's intestate, at said town of Sallisaw, Indian Territory, while in the discharge of his duty as a brakeman as aforesaid, and while attempting to make a coupling between said two cars was caught between said cars, mashed, crushed and instantly killed, on account of said wrongful and improper equipment of said two cars, and the negligent, defective and dangerous condition of same; that said cars were wrongfully and improperly equipped, and in a dangerous and defective condition, in this: said cars were not equipped with automatic or safety couplers, the draw bars on said cars were not of even, uniform or standard height, as required by the laws of congress, "and that in the trial of this case said act of congress will have to be construed by the Court, and that there will be a controversy as to the construction of said act of congress."

And the drawbars on said cars were faulty, cracked and in an unsafe and defective condition. That the defendant knew, or by an exercise of ordinary care and diligence could have known of the wrongful, improper and unsafe equipment of said cars, and the dangerous and defective condition thereof, (that each of said cars were at the time loaded, and were engaged in interstate traffic) that on account of the said wrongful, improper and unsafe condition of said cars, and the dangerous and defective condition of same when said cars were pushed together for the purpose of being coupled, one of the drawbars passed over the other, and each of said drawbars became cracked and broken, thereby catching plaintiff's intestate between said cars, crushing and killing him as aforesaid, while in the discharge of his duty attempting to couple said cars as aforesaid, without any fault or negligence on his part.

4 That plaintiff's intestate left a widow May Taylor, him surviving and William Neal a son 9 years old, and Lorna Doon Taylor a daughter 6 years old, and Geo. W. Taylor a daughter 1 year old, his only children and next of kin, who were poor and dependent upon him for support. That said children were also dependent upon him for nurture and education; that on account of said negligent and wrongful acts of defendant, said widow and next of kin have been deprived of their only means of support, said widow has lost the society of her husband; and said children have been deprived of the value of the training and instruction of their father. All to their great damage in the sum of $15,000.00.

Wherefore plaintiff prays judgment against the defendant for said sum of $15,000.00, for the use and benefit of the widow and next of kin, and for the costs of this action.

CHEW & FITZHUGH AND
W. H. NEAL,
Attorneys for Plaintiff.

Filed October 22, 1900.
W. P. SADLER, *Clerk*,
By Q. R. GALLOWAY, *D. C.*

5 In the Crawford Circuit Court, November Term, 1899.

JONATHAN NEAL, as Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Answer.

Comes the defendant, the St. Louis, Iron Mountain and Southern Railway Company, and for its answer to the complaint of the plaintiff in this case says:

It has no knowledge upon which to base a belief as to whether or not on the 21st day of February 1899, the probable court of Crawford County, Arkansas, granted to plaintiff letters of administration upon the estate of George W. Taylor, deceased, and that he is now the duly qualified and acting administrator of said estate, and defendant asks that plaintiff be held to strict proof of his allegations in this regard.

For the same reason the defendant asks that the plaintiff be held to a strict proof of his allegations that George W. Taylor was on the 3rd day of May, and remained until the day of his death, a citizen and resident of Van Buren in Crawford County, Arkansas.

Defendant denies that on the 18th day of January 1899, it disregarding its duty to plaintiff's intestate, maintained and equipped two of its freight cars in one of its west bound freight trains — so negligent, wrongful, improper, defective and unsafe condition, that plaintiff's intestate at the town of Sallisaw, Indian Territory, while in the discharge of his duty as brakeman for the defendant, and while attempting to make a coupling between said two cars, was
6 caught between said cars mashed, crushed, and instantly killed, on account of said wrongful and improper equipment of said two cars, and the negligent, defective and dangerous condition of the same. Defendant denies that said cars were wrongfully and improperly equipped, and in a dangerous and defective condition, in this that said cars were not equipped with automatic or safety couplers and the draw heads of said cars were not of even, uniform and standard height, as required by the laws of congress; and defendant denies that said draw bars of said cars were faulty cracked and in an unsafe and defective condition. Defendant declares that it had complied with all requirements of all laws of congress in the equipment of its car with automatic or safety couplers, and with drawbars of uniform or standard height, and defendant says that, upon the development of the facts under a correct reconstruction of the laws of congress, and the rulings of the Interstate commerce commission, pursuant to the provisions of said laws affecting this case, defendant will be shown to have been guilty of no negligence or default whatever in the matter of its car equipment. Defendant denies that it knew, or by the exercise of ordinary care and diligence could have known, of any wrongful improper and un-

safe equipment of said cars, and the dangerous and defective condition thereof. Defendant denies that on account of the wrongful, improper and unsafe equipment of said cars and the dangerous and defective condition of same, when said cars were pushed together for the purpose of being coupled one of the draw bars passed over the other and each of said drawbars became cracked and broken, thereby catching plaintiff's intestate between said cars and crushing and killing him, as aforesaid, while in the discharge of his duty attempting to couple said cars, as aforesaid, without any fault or negligence on his part.

Defendant declares the fact to be that if plaintiff's intestate was crushed and killed while attempting to couple the cars on de-
7 fendant's railroad, on the 18th day of January 1899, at Sallisaw, Indian Territory, he was so crushed and killed because of his own contributory negligence at the time, and that without such contributory negligence the injury and his death would not have occurred.

Defendant denies that on account of any negligence or wrongful acts of defendant May Taylor, widow, William Neal Taylor, son, and Lora Doon Taylor daughter, of plaintiff's intestate have been deprived of their only means of support, and that said widow has lost the society of her husband, and that said children have been deprived of the value of the training and instruction of their father, all to their great damage in the sum of Fifteen Thousand Dollars ($15000) or any other sum whatever.

Wherefore having answered in all respects plaintiff's complaint, the defendant asks to be discharged hence with all its costs in this behalf laid out and expended.

OSCAR L. MILES,
Attorney for Defendant.

Filed October 22nd 1900.
W. P. SADLER, *Clerk*,
By Q. R. GALLOWAY, *D. C.*

8 In the Crawford Circuit Court, June Term, 1899.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Bill of Exceptions.

On this day the above entitled cause was coming on to be heard, the defendant, the St. Louis, Iron Mountain and Southern Railway Company, filed its petition and bond for removal of this cause to the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division. Which motion was in words and figures as follows, to-wit:

Petition for Removal to U. S. Court.

"Crawford Circuit Court, June Term, 1899, State of Arkansas.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Petition for Removal of this Cause to the United States Circuit Court for the Western District of Arkansas, Fort Smith Division.

To the Honorable, the Circuit Court of Crawford County, State of Arkansas:

Your petitioner, the St. Louis, Iron Mountain and Southern
9 Railway Company, respectfully shows that it is the defendant in the above entitled suit, and that the matter and amount in dispute in said suit exceed, exclusive of the interest and cost the sum or value of $2,000.00.

That your petitioner was, at the time of the bringing of this suit, and still is, a citizen of the State of Arkansas, and that said plaintiff was then, and still is, a citizen of the State of Arkansas.

That said suit is of a civil nature, and was instituted by the plaintiff against the defendant for the purpose of recovering damages for the alleged negligent killing of plaintiff's decedent by the alleged negligent movement of one of defendant's trains in the Indian Territory, in the United States of America.

That said suit is one arising under the laws of the United States, in this, to-wit: That prior to the passage, by the Congress of the United States, of an act placing in force in the Indian Territory certain statutes of the State of Arkansas, no action would lie for death by wrongful act in the Indian Territory; and that, if the plaintiff is entitled to maintain his cause of action in this behalf, he is entitled to maintain said cause of action solely by reason of the passage of the aforesaid act of Congress, placing in force in the Indian Territory Chapter 119 of Mansfield's Digest of the statutes of the State of Arkansas.

And your petitioner further alleges that the aforesaid act of congress of the United States is not a general law of congress, applicable alike to all the States, but is a special law, and only locally applicable to the Indian Territory; that plaintiff's cause of action arises under, and has its origin in, this said Act of Congress, and that at the trial of the said cause of action, it will be necessary to construe this Act of Congress, in order to properly determine the relative rights of the plaintiff and the defendant in this suit.

10 And your petitioner offers herewith bond, with good and sufficient surety, for its entering in said Circuit Court of the United States on the first day of the next session, a copy of the record in this suit, and for paying all costs which may be awarded by said

Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make an order for the removal of this cause to the said Circuit Court of the United States, and to accept said surety and bond, and cause the record herein to be removed into said Circuit Court of the United States, Fort Smith Division, and it will ever pray.

OSCAR L. MILES,
Attorney for Petitioner.

11 STATE OF ARKANSAS, *County of Crawford:*

I, Oscar L. Miles, do solemnly swear that I am attorney for petitioner in the above entitled cause and that I have read the foregoing petition and know the contents thereof, and the statements and allegations therein contained are true, as I verily believe.

(Signed) OSCAR L. MILES.

Subscribed by the said Oscar L. Miles in my presence, and by him sworn to before me, this 27th day of June, 1899.

(Signed) PALMER DANAHER,
Notary Public.

My Commission Expires Oct. 3, 1902.

Bond for Removal.

Crawford Circuit Court, June Term, 1899.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,
vs.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Bond for Removal of Cause.

Know all men by these presents: That the St. Louis, Iron Mountain and Southern Railway Company, as principal, and Oscar L. Miles and George R. Wood, sureties, are held and firmly bound unto the plaintiff, Jonathan Neal, as administrator, in the penal sum of $1,000.00, for the payment whereof well and truly to be made unto said Jonathan Neal as Administrator, and unto his successors, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: Said St. Louis, Iron Mountain and Southern Railway Company having petitioned the Circuit
12 Court of Crawford County, Arkansas, for the removal of a certain cause therein pending, wherein Jonathan Neal, as administrator of the estate of George W. Taylor, deceased, is plaintiff,

and the St. Louis, Iron Mountain and Southern Railway Company is defendant, to the Circuit Court of the United States in and for the Western District of Arkansas, Fort Smith division.

Now if the said St. Louis, Iron Mountain and Southern Railway Company, your petitioner, shall enter in said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs which may be awarded by said Circuit Court of the United States, that if said Court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and virtue.

Witness our hands and seals this 19th day of June, A. D. 1899.

(Signed) ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
By OSCAR L. MILES.
OSCAR L. MILES.
GEORGE R. WOOD.

Above petition and bond endorsed on the back thereof: "Filed Oct. 22, 1900. W. P. Sadler, Clerk, by Q. R. Galloway, D. C.

And the court having said petition and bond for removal under advisement, and finding the same in all respects regular and in compliance with the law in such cases made and provided, did direct that this cause be transferred to the United States Circuit Court, for the Western District of Arkansas, Ft. Smith Division, and the same was accordingly done.

And after said cause was filed in the aforesaid United States Court, the plaintiff by his Attorney, filed in said Court the following motion to remand, to-wit:

13 *Motion to Remand to U. S. Court.*

In the United States Circuit Court, Fort Smith Division, Western District of Arkansas.

JONATHAN NEAL, Administrator of the Estate of George Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Motion to Remand to the State Court.

Comes the plaintiff and moves the Court to remand this cause to the Circuit Court of Crawford County, Arkansas, for trial, in which Court this cause was originally brought, and for cause says:

That both parties both plaintiff and defendant, are and were at the time of the bringing of said cause citizens of the State of Ar-

kansas, and that there is no federal question involved in the trial of this cause so as to give this Court jurisdiction of the subject matter.

Wherefore plaintiff prays an order of this Court remanding this cause to the Circuit Court of Crawford County, Arkansas, for trial, and for all other legal and proper relief.

W. H. NEAL &
CHEW & FITZHUGH,
Att'ys for Pl'ff.

And the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division, having said motion under advisement did sustain the same, and remand the cause to the Crawford Circuit Court for trial.

14 *Transcript, U. S. Court.*

United States Circuit Court, Western District of Arkansas, Fort Smith Division, June Term, 1899.

Transcript of the proceedings had in the case of—

No. 180.

JONATHAN NEAL, Adm'r Est. Geo. W. Taylor, Deceased, Pl'ff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO.,
Defendant.

1899.
July 10.—Transcript from Circuit Court of Crawford County, Arkansas, filed, and case docketed—

THURSDAY MORNING, 9 o'clock, July 13, 1899.

Court met pursuant to adjournment.
Present: Hon. Jno. H. Rogers, Judge of the District Court of the United States for the Western District of Arkansas.

JONATHAN NEAL, Adm'r, etc., Plaintiffs,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO., Defendant.

Compl't at Law, No. 180.

Messrs. Chew & Fitzhugh, Attorneys for plaintiff file motion to remand. Which motion is in words and figures as follows, to-wit:

Motion to Remand to State Court.

In the United States Circuit Court, Fort Smith Division, Western District of Arkansas.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILROAD, Defendant.

Motion to Remand to the State Court.

15 Comes the plaintiff and moves the Court to remand this cause to the Circuit Court of Crawford County, Arkansas, for trial, in which Court this cause was originally brought and for cause says:

That both parties plaintiff and defendant are and were at the time of the bringing of the said cause citizens of the State of Arkansas, and that there is no federal question involved in the trial of this cause so as to give this court jurisdiction of the subject matter.

Wherefore plaintiff prays an order of this court remanding this cause to the Circuit Court of Crawford County, Arkansas, for trial, and for all other legal and proper relief.

(Signed) W. H. NEAL &
CHEW & FITZHUGH,
Att'ys for Pl'ff.

(Endorsed on Back:) No. 180. Jonathan Neal, Adm'r, etc., *vs.* St. Louis, Iron Mountain & Southern R. R. Motion to remand. Filed in Open Court this July 13, 1899. (Signed) Thomas Boles, Clerk.

No. 180.

JONATHAN NEAL, Adm'r, etc., Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., Defendant.

JULY 29, 1899.

Now on this day the motion to remand heretofore filed herein is set for hearing on the 7th day of August, 1899.

16 *Order Remanding to State Court.*

No. 180.

JONATHAN NEAL, Adm'r Estate of George Taylor, Deceased, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., Defendant.

AUG. 7, 1899.

Now on this day the motion to remand this cause to the Circuit Court of Crawford County is taken up and argued by Counsel for the respective parties, and submitted to the Court and by the Court taken under advisement.

JONATHAN NEAL, Adm'r Estate of George W. Taylor, Deceased, Pl'ff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO., Def't.

AUG. 15, 1899.

Be it remembered that on the 15th day of August, 1899, the above cause came on to be heard, upon a motion heretofore filed by the plaintiff to remand this cause to the Circuit Court of Crawford County, in the State of Arkansas, for trial, and the Court after having heard the argument of Counsel for plaintiff and defendant and being otherwise sufficiently advised doth sustain said motion to remand. It is therefore considered ordered, adjudged by the Court that the said cause of Jonathan Neal, Administrator of the Estate of Geo. Taylor, deceased, against the St. Louis, Iron Mountain & Southern Railway be and the same is hereby remanded to the Circuit Court of Crawford County, Arkansas for trial.

UNITED STATES OF AMERICA,
Western Division of Arkansas, Fort Smith Division:

I, Thomas Boles, Clerk of the Circuit Court of the United States for the Fort Smith Division of the Western District of Arkansas, in the Eighth Circuit hereby certify that the foregoing trans-
17 cript annexed to this certificate is a true and complete copy of the proceedings had, and orders of Court made in the case of Jonathan Neal, Adm'r of Estate of Geo. W. Taylor, deceased, against St. Louis, Iron Mountain and Southern Railway Company. The original of which remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Fort Smith, in said District, this 28th day of August, A. D. 1899.

THOMAS BOLES, *Clerk.*

(Endorsed on back:) Filed Oct. 22, 1900. W. P. Sadler, Clerk, by Q. R. Galloway, D. C.

And the cause was remanded to, and docketed in said Crawford Circuit Court.

18 In the Crawford Circuit Court, November Term, 1899.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Motion to Dismiss. Motion Overruled.

The above entitled cause coming on to be heard, the defendant, the St. Louis, Iron Mountain and Southern Railway Company, moved to dismiss said cause from the docket of this Court, for the reason that the same is in law and fact pending in the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division; and the Court having said motion under advisement overruled the same; and to the action of the court in this behalf the defendant at the time excepted.

Plaintiff Amends Complaint.

Thereupon plaintiff asked leave of the Court to amend his complaint by interlineation as follows:

"That plaintiff's cause of action arises under an Act of Congress and in the trial of said case there will be a controversy as to the construction of said act of Congress."

And that in the trial of this case said act of Congress will have to be construed by the Court, and that there will be a controversy as to the construction of said act of Congress.

Def't Files 2nd Petition to Removal to U. S. Court.

And after said complaint was thus amended by the plaintiff the defendant filed its second petition and bond for removal of this cause to the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division, which was in words and figures as follows, to-wit:

19 *Petition.*

Crawford Circuit Court, Nov. Term, 1899, State of Arkansas.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Petition for Removal of This Cause to the United States Circuit Court for the Western District of Arkansas, Fort Smith Division.

To the Honorable the Circuit Court of Crawford County, State of Arkansas:

Your petitioner, the St. Louis, Iron Mountain and Southern Railway Company, respectfully show- that it is the defendant in the above entitled suit, and that the matter and amount in dispute in said suit exceed-, exclusive of the interest and costs the sum or value of $2,000.00.

That said petitioner was, at the time of the bringing of this suit and still is, a citizen of the State of Arkansas, and that said plaintiff, was then, and still is, a citizen of the State of Arkansas.

That said suit is of a civil nature, and was instituted by the plaintiff against the defendant for the purpose of recovering damages for the alleged negligent killing of plaintiff's decedent by the alleged negligent movement of one of defendant's trains in the Indian Territory, in the United States of America.

That said suit is one arising under the laws of the United States, in this, to-wit: That prior to the passage by the Congress of the United States, of an act placing in force in the Indian Territory certain statutes of the State of Arkansas, no action would lie for death by wrongful act in the Indian Territory; and that if
20 plaintiff is entitled to maintain his cause of action in this behalf he is entitled to maintain said cause of action solely by reason of the passage of the aforesaid act of Congress, placing in force in the Indian Territory chapter 119, of Mansfield's Digest of the Statutes of the State of Arkansas.

And your petitioner further alleges that the aforesaid act of Congress of the United States is not a general law of Congress applicable alike to all the States, but is a special law, and applicable locally only to the Indian Territory. That plaintiff's cause of action arises under and has its origin in this said act of Congress and that at the trial of said cause of action, if plaintiff shall be able to recover, it will be by reason of the construction placed upon this act of Congress; and at the trial of this cause of action it will be necessary to construe this act of Congress in order to properly determine the relative rights of the plaintiff and the defendant in this suit.

And your petitioner further shows that, subsequent to the filing of its former petition and bond for removal of this cause to the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division, plaintiff amended his complaint, thereby alleging negligence upon the part of defendant in that defendant had not complied with certain laws of Congress requiring defendant's cars to be equipped with automatic or safety couplers. Your petitioners would show that it is a common carrier, engaged in interstate commerce, and was such at the time of the injuries alleged in plaintiff's complaint, and that the aforesaid laws of Congress and those hereinafter referred to, are applicable to your petitioner. Your petitioner would show that at the trial of this cause it will be necessary to construe a certain act of Congress of March 2, 1893, requiring railroads to equip their cars with automatic and safety couplers; it will be necessary to construe the action of the interstate commerce commission, taken on December 23, 1893, whereby the time
21 for the equipment of defendant's cars with automatic and safety couplers was alleged to have been extended; it will be necessary for the Court to determine whether or not the defendant under the terms and provisions of this federal law, and the action of the Interstate Commerce Commission, a federal creation, deriving all of its authority from Federal Law, was negligent as alleged in plaintiff's complaint.

Your petitioner asks that the amended complaint of plaintiff together with the answer of defendant filed herein, be taken, made and considered as a part of this petition.

And your petitioner offers herewith bond, with good and sufficient surety, for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs which may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further herein, except to make an order for the removal of this cause to the said Circuit Court of the United States, and to accept said surety and bond, and cause the record herein to be removed into said Circuit Court of the United States in and for the Western District of Arkansas, Ft. Smith Division, and it will ever pray.

OSCAR L. MILES,
Attorney for Petitioner.

STATE OF ARKANSAS, *County of Crawford:*

I, Oscar L. Miles do solemnly swear that I am Attorney for the petitioner in the above entitled cause, and that I have read the foregoing petition and know the contents thereof, and the statements and allegations therein contained are true, as I verily believe.

OSCAR L. MILES.

Subscribed by the said Oscar L. Miles in my presence and by him sworn to before me, this — day of —— 1899.

—— ——.

22 Crawford Circuit Court, Nov. Term, 1899.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Bond for Removal.

Know all men by these presents: That the St. Louis, Iron Mountain and Southern Railway Company, as principal, and Oscar L. Miles and George R. Wood sureties are held and firmly bound unto the plaintiff Jonathan Neal, as administrator in the penal sum of $1,000.00 for the payment hereof well and truly to be made unto said Jonathan Neal, as administrator, and unto his successors, we bind ourselves, our heirs, representatives and assigns jointly and severally, firmly by these presents.

Yet, upon these conditions: that said St. Louis, Iron Mountain and Southern Railway Company having petitioned the Circuit Court of Crawford County, State of Arkansas, for the removal of a certain cause therein pending, wherein Jonathan Neal as administrator of the estate of George W. Taylor, deceased, is plaintiff, and the St. Louis Iron Mountain and Southern Railway Company is defendant, to the Circuit Court of the United States in and for the Western District of Arkansas, Ft. Smith Division.

Now if the said St. Louis, Iron Mountain and Southern Railway Company, your petitioners, shall enter in said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs which may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly
23 removed thereto, then this obligation shall be void, otherwise to remain in full force and virtue.

Witness our hands and seals this 22 day of Nov. A. D. 1899.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
By OSCAR L. MILES.
OSCAR L. MILES.
GEORGE R. WOOD.

Endorsed on back: "Filed Oct. 22, 1900. W. P. Sadler, Clerk. By Q. R. Galloway, D. C.

24 And the court having said second petition and bond under advisement did overrule the same, and to the action of the court for removal in this regard the defendant at the time saved its exceptions.

Appeal to Supreme Court and Reversed and Remanded for New Trial.

And afterwards the above entitled cause came on to be heard before the Honorable J. H. Evans, Judge, presiding, and a jury empaneled to try the issues joined, and after hearing the testimony in the case, the Court on motion of the defendant, directed the jury to return a verdict for the defendant on the ground that the testimony taken in its strongest probative sense most favorable to the plaintiff, would not justify a jury in finding a verdict against the defendant; and the plaintiff filed his motion for a new trial, and took an appeal to the Supreme Court of the State of Arkansas, and said cause was reversed and remanded for a new trial.

In the Crawford Circuit Court, June Term, 1904.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

The above entitled cause coming on to be heard, the defendant filed its motion to dismiss this cause, which was in words and figures as follows, to-wit:

Motion to Dismiss.

In the Crawford Circuit Court, June Term, 1904.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Comes the defendant the St. Louis, Iron Mountain and Southern Railway Company, and protests the trial of this cause in this
25 Court for the reason that said cause is only triable in the United States Court at Ft. Smith, Arkansas, and moves the Court to dismiss this cause from the docket of this Court and to direct that the same be removed to the United States District Court for the Western District of Arkansas, Fort Smith Division, for trial.

(Signed) ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
By OSCAR L. MILES, *Attorney.*

Motion to Dismiss Overruled.

And the court having said motion under advisement did overrul the same, and to the action of the Court in this behalf, the defendan at the time saved its exceptions.

26 In the Crawford Circuit Court, June Term, 1904.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Bill of Exceptions.

On this 30th day of June 1904, the above entitled cause coming on for trial, before the Hon. J. H. Evans, Judge, came the plaintiff by his Attorneys Chew & Fitzhugh, and Berkley Neal and W. H. Neal and came the defendants, by its attorneys Oscar L. Miles and Lovic P. Miles and all parties being ready for trial, a good and lawful jury was empaneled and sworn to try the issues joined.

Thereupon the plaintiff in order to maintain the issues upon his part, introduced the following testimony, to-wit:

Plaintiff's Testimony.

Here it was admitted upon the record by Counsel for the defendant that Jonathan Neal is the administrator of the Estate of George W. Taylor, deceased, properly qualified, and the proper plaintiff in this case.

Testimony of Earl Witt.

EARL WITT, a witness for the plaintiff, being duly sworn testified as follows:

Examination by S. R. CHEW:

Q. What is your name?
A. Earl Witt.
Q. How old are you?
A. Thirty-three.
Q. Where were you raised?
A. In Arkansas.
27 Q. What County?
A. I was born in Van Buren County.
Q. You lived in Conway, Ark.?
A. Yes sir.

Q. Where are you living now?
A. Monette, Missouri.
Q. How long have you lived in Monette?
A. Little over three years and a half.
Q. What business are you engaged in at present?
A. Running a train on the St. Louis and San Francisco Railroad.
Q. In what capacity.
—. Conductor.
Q. How long have you been engaged in the railroad business?
A. Ten years train service.
Q. In what capacity have you been engaged in the train service?
A. Brakeman and conductor.
Q. I will ask you to state if you have ever lived in Van Buren?
A. Yes sir.
Q. How long did you live here?
A. Little over seven years.
Q. What business were you engaged in at that time?
A. Railroad service.
Q. For whom?
A. St. Louis, Iron Mountain and Southern Railway Company.
Q. In what capacity?
A. Brakeman.
Q. Are you acquainted with a man by the name of Charles Lattin?
A. Yes sir.
Q. Where did he live in January 1899?
A. Head quarters at Van Buren.
Q. What business was he engaged in?
A. Conductor.
Q. Upon what road?
A. St. Louis, Iron Mountain and Southern.
28 Q. While you were acting as brakeman, for whom did you brake?
A. Conductor Lattin.
Q. What was your run in January 1899?
A. We were in the through freight service.
Q. From where to where?
A. Van Buren, Ark. to Coffeyville, Kansas.
Q. Over what line of railroad?
A. The Kansas and Arkansas Valley District of the St. Louis, Iron Mountain and Southern.
Q. When you speak of Iron Mountain, you mean the St. Louis, Iron Mountain and Southern?
A. Yes, sir.
Q. In going from Van Buren, Arkansas, to Coffeyville, Kansas, over the line of railroad, what part of the Country do you pass through?
A. A portion of Arkansas, through the Indian Territory, and a portion of Kansas.
Q. What is the gauge of that portion of the St. Louis and Southern Railway, reaching from Van Buren to Coffeyville, Kansas?

A. Known as standard Gauge.
Q. What is a standard gauge Mr. Witt?
A. I do not know exactly, four eight and three quarters, I think.
Q. You have been a brakeman between Van Buren and Coffeyville Kansas?
A. I broke here a little over six years—six years and three months
Q. How long have you been braking up to January 18, 1899?
A. About four years and six months.
Q. Were you acquainted with a gentleman by the name of George Taylor?
A. Yes sir.
29 Q. How long had you known him?
A. Ever since I had been on the road, about four years and a half.
Q. What business was George Taylor engaged in?
A. He was a brakeman.
Q. On what line?
A. On the St. Louis, Iron Mountain and Southern.
Q. What was his run?
A. Through freight service.
Q. State if he was in the same crew with yourself?
A. Yes he was.
Q. What was his position on the train?
A. Rear brakeman.
Q. Call them what?
A. Caboose brakeman.
Q. What was his duties as a caboose brakeman?
A. He acted as flagman, assisting in stopping trains, helped do the switching or anything of the kind.
Q. Anything else?
A. Do any repair work on the cars that could be done on the road put in brasses and things of that kind.
Q. In doing the switching, state whether or not his duties required him to make coupling cuts of cars?
A. Both kinds as a rule the rear brakeman is the field man of the crew that way, that is catch cars wherever they are cut off.
Q. When he catches cars that are cut off what does he do then?
A. He rides them wherever he wants them ridden to.
Q. If a coupling is to be made, who makes it?
A. He does.
Q. Part of his duty is to make couplings?
A. Yes sir.
Q. Where were you on the 18th day of January, 1899, in the morning?
30 A. I do not know I was on the road I think.
Q. I will ask you if you left the town of Van Buren on that day?
A. Yes sir.
Q. To go where?
A. Coffeyville, Kansas.

Q. In what capacity?
A. As brakeman.
Q. Did George Taylor leave with you that day?
A. Yes sir.
Q. What time did you leave Van Buren?
A. I do not remember the hour.
Q. Do you remember the number of your train?
A. 265, I believe.
Q. In the way of refreshing your memory don't you know that you left here about 2:45 P. M.?
A. I cannot say I know positively.
Q. You recollect testifying here before?
A. Yes over three years ago.
Q. You were on train 265?
A. I believe that was the number of it.
Q. What did that train consist of?
A. Lumber and I do not know what all. I do not know what the consist of the train was we had twenty odd cars.
Q. Box cars?
A. I think so.
Q. When you left Van Buren?
A. Yes sir.
Q. You do not remember the hour you left Van Buren?
A. No sir.
Q. I will ask you by way of refreshing your memory if that question was not asked you upon a former trial of this case,
31 and you answered that you were called for 2:45 P. M.?
A. I do not remember whether it was, you have got my statement there. I do not know that that would refresh my memory.
Q. You left here sometime in the afternoon of January 18, 1899?
A. I believe it was in the afternoon.
Q. On through freight train?
A. Yes sir.

Mr. Oscar Miles: For the purpose of this trial I am willing to admit that it was 2:45 P. M.

Mr. Chew:

Q. You had some twenty odd cars?
A. Yes sir.
Q. Do you remember about what hour you got to Sallisaw, and if Sallisaw is a station on the St. Louis, Iron Mountain and Southern Railway?
A. Sallisaw is a station. I do not remember just what hour we got to Sallisaw; it is twenty eight miles from here, and the run ordinarily is about an hour and a half, with fair success.
Q. Have anything unusual to occur on that trip on that day between here and Sallisaw?
A. I do not remember anything.
Q. How many miles?

A. Twenty-eight miles.
Q. Sallisaw is in the Indian Territory?
Q. Yes sir.
Q. Do you remember if you did any work between here and Sallisaw?
A. I do not remember of doing any work between here and Sallisaw.
Q. When you got to Sallisaw, what did you do?
A. We set out one or two cars there.
Q. Do you remember the character of the cars you set out?
32 A. Two box cars, as well as I remember.
Q. What did you do in regard to setting the cars out?
A. It is pretty hard for me to remember now just what we did do. In the first place we made one or two cuts in setting the cars out; I cut off one car I think and threw it in the side track; and made another cut.
Q. In making this cut of the first car you put that in the side track?
A. Yes sir.
Q. What was the object of making the second cut?
A. To get another car we had set out.
Q. How many cars did you have in the first cut?
A. One.
Q. Where was the car in relation to the engine?
A. It was about 16 or 17 car lengths from the engine.
Q. In throwing that car in the side track, which end did you put it in?
A. West end.
Q. On which side of the main line track at Sallisaw is the side track?
A. On the south side.
Q. How far was it from the depot to the west switch stand?
A. About, I suppose, seventy-five yards; I do not know exactly.
Q. West from the depot to the main line switch stand is about seventy five yards?
A. I presume about 75 yards.
Q. In making the first cut you say you had about 16 cars, where did you leave your caboose?
A. It was standing near the depot.
Q. How many cars attached to it?
A. Six as well as I remember.
Q. You threw these sixteen cars off onto the side track?
33 A. Yes sir.
Q. Then what did you do?
A. Made the next cut of fourteen cars on the main line to get to the second car we had for Sallisaw.
Q. This second car was about two cars back from the engine?
A. Yes sir.
Q. You had two cars attached to the engine for the purpose of throwing the second car from the engine back into the side track?

A. Yes sir.
Q. You did that?
A. Yes sir.
Q. You threw the switch that day at the west end?
A. I do not know; I do not remember now; either myself or brakeman Willoughby Marshall; he was on the ground?
Q. Do you know where Marshall is?
A. He is in town I presume; I saw him this morning about ten o'clock.
Q. What was done with the second cut of fourteen cars?
A. Kicked down the main line.
Q. In kicking them back, what do you mean by that?
A. Kicking a car is cutting a car loose from the rest of the train, and giving it sufficient speed to kick it to wherever you want it to run without the engine.
Q. Where were these fourteen cars in relation to the switch stand west of the depot at Sallisaw, when you gave them this speed to kick them back?
A. The east car was I presume just over the switch, perhaps one or two car lengths, do not make a stop exactly at the point of the switch to get over the switch in order to throw it; it may have been two or three car lengths west of the switch, might not have gone but one.
Q. Clear the points of switch stand in order to clear the throw rail?
34 A. Yes sir.
Q. And get the throw rails back to the main line?
A. Yes sir.
Q. Then the kick when it was made, of the cars and engine, all were on the main line?
A. Yes sir.
Q. Do you remember where you were standing at the time this kick of the cut cars passed you?
A. I think I was standing west of the trestle, just a few feet west of the west switch as well as I remember I think I went over the other side of the trestle to cut these cars off.
Q. Went over to the west side of the little trestle for the purpose of cutting the cars and left the two cars to the engine?
A. I think there is where I was, as well as I remember.
Q. Know anything about the clearing post there?
A. I do not know whether there was a clearing post there then or not I presume there was.
Q. Then the cars were far enough west of the switch to let another train clear the throw rail?
A. Yes sir.
Q. When the cars left you, what rate of speed were they going back in an easterly direction?
A. I do not remember just what rate of speed they were going now.
Q. Give your best estimate.

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A. That is pretty hard for me to say. If I were going to kick a car it would depend upon the distance, grade, etc., about how hard I would kick it to get it where I wanted it.

Q. I am not asking for an expert opinion.

A. I want to give the absolute facts in this.

Q. You testified twice.

A. Whatever the rate of speed I gave you in the first testi-
35 mony was according to my best judgment of the speed of those cars at that time, but now I do not exactly remember, that is what you will have to refer to, because I cannot repeat what I said then in regard to the speed of those cars.

Q. Your deposition was taken and read over to you then?

A. Yes sir.

Q. And you swore to it?

A. Yes sir.

Q. On which side of the track were you standing at the time these cars were kicked back?

A. I was on the north side of the track, working on the engineer's side.

Q. Which side of the depot were you on?

A. North side.

Q. When you kicked these cars back were they on the main line?

A. The second cut were on the main line.

Q. And going back in the direction of where you left these cars on the main line?

A. Yes sir.

Q. You cannot tell us what rate of speed the cars were travelling as they came back east on the main line?

A. I do not remember just what speed.

Q. Your best recollection about it?

A. Five or six or eight miles, may be eight miles per hour.

Q. What was the character of the track in the way the cars were travelling back east—up or down grade?

A. It was slightly up grade?

Q. How far back east would they be up grade?

A. About 100 or 200 feet east of the station depot.

Q. The grade would extend east of the depot at least 200 feet?

A. About the east switch stand I think would be the top of the grade.

Q. Any way the direction these cars were travelling it was
36 slightly up grade?

A. Yes sir.

Q. Did you see Mr. Taylor after this cut of fourteen cars left you until he was injured?

A. You will have to refresh me from what I give you before Mr. Chew.

Mr. Oscar L. Miles: I do not think that is the proper way to examine a witness.

Mr. Chew:

Q. What is your best recollection Mr. Witt as to whether or not

you saw George Taylor after these fourteen cars in this second cut passed the switch stand coming back in an easterly direction?

A. I think he was on the side of the car, but where he got on I do not remember; I think he was on the side of the east car.

Q. Did you see him on the side of the car as you recollect now?

A. That is my recollection.

Q. What car was he on?

A. I cannot state positively about that.

Q. You stated just now the east car?

A. Yes the east car of the cut.

Q. East car of the 14 car cut?

A. Yes sir.

Q. That would be the car that was next to the west end of the six cars down on the main line?

A. Yes sir.

Q. How was he on this side of the car as you recollect it?

A. Side ladder, my recollection in regard to his position is not very clear Mr. Chew, I think he was on the side of the car, but that is rather indistinct.

Q. Is that the usual place for a brakeman to ride when making coupling in the yard.

Defendant objected.
37 Objection overruled.
Defendant saved its exceptions.

A. It is the usual place if he does not intend to get up on top of the car to get on the side ladder.

Q. And ride the cars back for what purpose?

A. To couple them on or to stop them, they may be on grade, or check them to keep them from rolling back.

Q. About how long were these box cars at that time?

A. Different length, 28 to 34 feet box cars.

Q. About what is the space between box cars when coupled together at that time?

A. Now?

Q. No difference now?

A. These automatic couplers are used now.

Q. Cars in the condition they were at that time?

A. They vary, we had some automatic couplers in use then, and had some link and pin draw bars at that time, the link used here is about ten inches long, I think, or was used at that time, the distance was I presume, about twenty inches where two common draw bars coupled together.

Q. These fourteen cars coupled as they were, what would you say was the space between the cars?

A. The length of the space between the cars?

Q. Yes sir.

A. I could not estimate that because I do not remember what kind of couplers were used.

Q. If all were automatic how far?

A. If all automatic, much closer together.

Q. How close would that get them?

A. Another thing it would depend upon how much slack in the draw bar, and how far it would come out.

Q. You were on oath there tell it just as you recollect it, how far were these cars apart, the space between these cars?

38 A. I could not give you an answer to that.

Q. About how far?

The COURT: Give your best judgment.

WITNESS: Your honor, my judgment.

The COURT: Your estimate.

The WITNESS: You want the space between the cars in this cut.

Mr. CHEW:

Q. About what the average was, the opening between the cars?

A. Maybe fifteen inches average between the cars.

Q. You say the cars were between 28 and 34 feet?

A. The cars used at that time—longest box cars.

Q. Were these all box cars in that cut?

A. I do not remember whether they were or not.

Q. What is your best recollection?

A. I think all were box cars.

Q. How far was George Taylor from the west end of these six cars standing on the main track, about, when you saw him last on the side of the car?

A. I do not know what the distance was.

Q. In car lengths.

A. I do not know.

Q. What side was he on, east or west side.

A. He would be east of the west switch, I do not know how far.

Q. When you last saw him, how far was he from the west switch stand of these cars?

A. I do not know how far.

Q. At the depot?

A. No he was not at the depot, for he was on these fourteen cars, as I remember the west car of the six cars, with the caboose were standing I think, the west car of the six was standing west of the depot.

39 Q. That is then between the depot and the west switch stand?

A. Yes sir.

Q. How far would you say he was when you saw him last east of the switch stand?

A. Might have gotten on right close to the switch.

Q. I did not ask where he got on, how far was he away from the switch stand back east when you last saw him on the car?

A. My recollection is very dim on the matter, and the question is hard for me to answer.

Q. Was he in five car lengths of the west end of the west car of the six car cut on the main track?

A. I do not know whether he was in five or ten car lengths.

Q. Where was he when he got on?

A. I do not know as I saw him get on.
Q. Where was he when you saw him first on the car?
A. There is no difference in that question and the other.
Q. You do not remember?
A. No sir, I do not.
Q. Do you know what the number and initial of the car on the east end of the 14 car cut was?
A. I would not say positively, but I think it was a Missouri Pacific car.
Q. What number?
A. I do not know.
Q. You do not remember the number of the car?
A. No sir.
Q. Was it a system car?
A. Yes, a Misouri Pacific car.
Q. When you speak of a system car, you mean a car belonging to the railroad in which the St. Louis, Iron Mountain and Southern Railroad was in that system?
A. Yes sir.
Q. Would you know the number of the car if you were to hear it?
A. I could not say, I do not think I would.

Mr. Oscar L. Miles: These numbers are correctly set out and you can take them as true, and also the same thing is set out in Lattin's testimony taken at the former trial.

Mr. Chew:

Q. The Missouri Pacific car was 12224?
A. I would not say positively.
Q. What is your recollection?
A. I have no recollection now of the number; I know there was a number on the car.
Q. Do you remember the initial of the other car?
A. You mean the west car of the cut on the main line?
Q. Yes sir.
A. That was an Iron Mountain car.
Q. Was that 11962, do you remember?
A. I remember two cars involved, one a Missouri Pacific and the other an Iron Mountain.
Q. Both system cars.
A. Yes sir.
Q. Tell the jury what character of drawbars was in the west end of the east car in the fourteen car cut?
A. That was link and pin draw bar.
Q. What do you mean by a link and pin draw bar?
A. It is a draw bar in which a link and pin is used in making a coupling to another car.
Q. In order to make a coupling where does the link enter the draw bar?
A. In the mouth of the draw bar right at the end of it.
Q. What holds the link in there.

A. The pin.

Q. Drops down from where?

41 A. From the top of the draw bar.

Q. Your recollection is that the west car of the fourteen c cut had a link and pin coupler in the east end of that car?

A. Yes sir.

Q. That is your recollection?

A. Yes sir.

Q. What kind of draw bar was in the west end of the west car the six car cut on the main line?

A. Automatic.

Q. Do you remember the make?

A. I believe it was what is known as a Missouri Pacific No. 2, well as I remember.

Q. That is your recollection?

A. Yes sir.

Q. These couplers will couple how?

A. Couple itself when there is another car with the same kind draw bar being coupled to it.

Q. Couple by impact?

A. Yes sir.

Q. The force of the train coming together?

A. Yes sir.

Q. When a link and pin coupler is to be coupled to one of th automatic draw bars, how do you get the link fastened to the au matic draw bar?

A. There is a slot in the knuckle of the automatic draw bar, a there is a pin holder in it.

Q. Tell the jury and the court whether that slot is in the center the automatic draw bar or to one side?

A. It is on one side of the knuckle.

Q. How far from the center of the draw bar?

A. It would be about opposite of the center of the mouth of t draw bar.

42 Q. Would be to one side of the center of the draw bar?

A. Yes sir.

Q. I am talking about the automatic draw bar itself, my ha here is an automatic coupler, the face of my hand, if you wanted couple a link and pin draw bar to this, where would you put t link (illustrating with his hand)?

A. In the knuckle of the automatic draw bar.

Q. Would that be to one side or in the center?

A. It would be to one side this knuckle.

Q. Is there a slot or opening on both sides?

A. Only on one side of the knuckle.

Q. Did you see Mr. Taylor's body there after the cars came gether?

A. Yes, I saw him.

Q. Where did you see it?

A. Lying on the ground near the track where these cars collid I do not know just exactly the position from the platform.

Q. Which side of the depot was his body lying on when you saw him, west or east?

A. On the west side.

Q. How far west?

A. It was not many feet west of the west end of the platform; I think it was just west of the little road crossing, just west of the platform; just about the road crossing—somewhere near the road crossing.

Q. How far was that from where you left the six car cut; right at it or away from it?

A. It must have been right near that crossing, as well as I remember.

Q. Just how far west was this west car in the six car cut?

A. It would be I presume, two or three car lengths.

Q. Then the body was that far west of the depot was it?

43 A. Yes sir.

Q. Tell the jury the condition the body was in when you saw it as to any physical injuries?

A. I did not make any examination of the body; his face was just a little darkened by cinders, coal, etc.

Q. Did you examine his skull?

A. No, sir; he was lying on his back.

Q. Did you see any violence having been done to the side of the head?

A. I did not make any examination at all.

Q. What was the condition of his body when you saw it; was he dead or living?

A. Dead.

Q. How long had he been dead?

A. It was a matter of a minute or two perhaps after the accident that we came up there where he was.

Q. Tell us, please, if you remember, about the speed these cars were traveling when they came together; you say you heard the collision?

A. That is hard to give from memory.

Q. You gave your testimony a short time after it occurred?

A. Yes sir.

Q. I want to refresh his memory by submitting his signature; was your deposition taken in the office of Chew & Fitzhugh?

A. I gave a statement in there.

Q. You were sworn there?

A. Yes sir.

Q. Is that your signature (Presenting paper)?

A. Yes, sir.

Q. I want you to read this question and your answer there, do not read it to the jury, so as to refresh your mind as to the speed of those cars. (Here witness reads.) Since having read that,

44 does it refresh your mind as to the speed of the train? You testified the truth about it before?

A. Yes, this was given as the truth.

Q. After reading this, does it refresh your mind as to the speed

the cars were traveling. Who have you been talking to about these cars?

A. I have not spoke to any one.

Q. What speed were these cars traveling at the time they came together?

A. Your honor, I do not know whether that enlightens me any or not in regard to the speed of the cars; if I made that statement then, it is a fact, I gave it as my best judgment, and that is the way of it.

Q. What did you testify there about it?

A. Three or four miles per hour.

Q. Was that true?

A. According to my judgment.

Q. Since reading that does it refresh your memory?

A. I do not know that it does.

Q. All those things were fresher in your mind then than now?

A. Yes, sir.

Q. Where were you when these cars came together?

A. I was about the west switch on the north side of the track.

Q. How far was the west car of the fourteen car cut from you, from the west switch when the cars came together?

A. I was opposite some of these cars, I do not know which ones.

Q. I will ask you if the entire fourteen cars were east of you at the time?

A. No, sir, they were not east of me as I remember.

Q. East of the switch stand?

A. I could not say about that now.

Q. You do not know whether or not all the cars had passed the each switch stand?

45 A. They were not in the clear as I remember; they may have been east of that switch stand or switch point.

Q. But not in the clear?

A. No, not in the clear.

Q. How far would it have to be east of that switch stand to be in the clear?

A. Would be about 75 feet from the clearing post, and may be not so far; I do not know the distance from the switch point to the clearing post; may be fifty or sixty feet to be in the clear.

Q. The west end of these fourteen car- was not in the clear at the time they came together?

A. No, I do not think they were.

Q. How were these cars running as to the ordinary and usual manner in which cars were running when you coupled them; running faster than couplings are usually made; at the time they passed you, were they running any faster than when Brakemen ordinarily make couplings when they caught Taylor?

A. When they passed me, yes they were.

Q. At the time they came together?

A. I have made couplings at four or five miles per hour, and I said they were running three or four miles per hour to my best judgment when they struck.

Q. Can you make a coupling when running four or five miles per hour?

A. I have made couplings going that fast.

Q. What became of Mr. Taylor's body after you saw it west of the depot?

A. It was taken in the freight room of the station.

Q. Who was at the body when you got to the depot?

A. I do not know of any one being there.

Q. Was Lattin there?

A. Not right at the depot, because he called me and told
46 me of the accident, and was down west of there a little ways, I do not remember just where he was.

Q. How did it happen that you are present in person at this trial?

A. On orders from my trainmaster to report here to the Iron Mountain attorney at Van Buren.

Q. Did you see the two cars between which Mr. Taylor lost his life after you saw his dead body?

A. Yes, sir.

Q. Where were they?

A. On the main line. The east end of the east car of the 14 car cut, the trucks were derailed just west of the platform there about the crossing.

Q. Did you get them back on the rail?

A. They were rerailed, but I do not think that I took any part in it at all.

Q. They were put back on the rail?

A. I think they were rerailed before I left; yes, they were rerailed.

Q. After they were rerailed, what was done with the east car in the fourteen car cut?

A. It was sidetracked there.

Q. What was done with the west car in the six car cut?

A. I do not remember, sir; I do not remember whether it was set out there or not.

Q. You swear that here?

A. I do not remember that that car was set out there.

Q. Tell this jury if you made any examination of the height of those draw bars there at the time?

A. I do not remember making any examination; I did not measure them.

Q. Did you notice them?

A. Yes, sir.

47 Q. Did you notice the drawheads?

A. Yes, sir.

Q. Tell this jury how close these draw-heads were together when you examined them?

A. I do not know Mr. Chew, now, what examination I made; I do not know.

Mr. CHEW: I shall appeal to the court to allow me to ask this man leading questions; your honor sees how he testifies here.

Mr. MILES: I object to the counsel criticising the witness before the jury, he brought him here himself and took his deposition himself.

Mr. CHEW: I am willing to let this witness stand aside and stand on his deposition.

Defendant objected.

Mr. CHEW: I claim the privilege of asking this man direct and leading questions.

The COURT: Ask him direct questions.

Mr. CHEW:

Q. You were sworn before Park Crutcher, Notary Public, at the office of Chew & Fitzhugh when you gave your deposition.

Counsel for def't objected to any questions asked about the deposition.

The COURT: He may answer brother Miles; they may offer it for the purpose of impeachment.

Defendant saved its exceptions to the ruling of the court.

Mr. CHEW:

Q. Were you sworn in the office of Chew & Fitzhugh by Park Crutcher, when you gave your deposition there the 19th day of November, 1900?

A. Your honor, I made a statement in that office, but I do not know whether I swore to it before Park Crutcher or whom.

Q. Is that your signature?

A. Yes, sir.

48 Q. Did Crutcher swear you in that office?

A. I do not remember whether it was Crutcher.

Q. Will you swear that he did not swear you?

A. No, sir.

Q. What examination did you give those draw-heads?

A. I remember that I saw the automatic draw-bar and link after the accident and noting how this other draw bar went up on the link, scouring on the link and scarring on top of the knuckle of this automatic draw bar; I remember seeing these things; the head of the common draw bar was broken off; I do not remember making any further examination; I did not take any measurements or anything of the kind.

Q. You did not take any measurements?

A. No, sir.

Q. Did you look at these draw bars?

A. I noticed the automatic draw bar.

Q. You noticed the draw bar that the draw head was broken off?

A. I saw that it was broken off.

The COURT:

Q. If I understand the witness correctly, the automatic coupler was in the stationary car, standing car?

A. Yes, sir.

Q. That was in the east division of the train?
A. Yes, sir.

Mr. CHEW:

Q. The link and pin coupler was in the east end of the west cut?
A. The west car of the fourteen cars.
Q. The east end of the fourteen cars?
A. The east end of the east car of the fourteen cars.
Q. You saw that; you looked at that did you?
A. Yes, sir.
Q. Did not see that the knuckle was broken?
49 A. I do not remember about the knuckle broken. I remember about the knuckle being scarred and the link being scarred, and the head of this common draw bar being broken off.
Q. Is there anything there you call dead timber between the cars?
A. Yes sir.
Q. How far from the dead timber was it broken?
A. I could not say; just about even; I think as well as I remember, about even with the dead wood.
Q. Describe the neck of that link and pin coupler, about the size of it?
A. About five or six inches wide, pretty near square; five or six inches; four or six inches square.
Q. What is the condition of the neck back there—solid iron or a hole in it?
A. Hole in the neck of these draw bars.
Q. What is that for?
A. The same that runs through the draw bar that fastens it.
Q. Back in the mouth?
A. Back in the car.
Q. How big is the rod of iron that passes in there?
A. About that large (indicating).
Q. About two inches in diameter?
A. Yes sir.
Q. Goes through or into the neck of the draw bar, the common link and pin draw bar?
A. Yes sir.
Q. You say that was broken off?
A. The head was.
Q. The hole comes clear up to the shoulder does it not?
A. Runs clear through the draw bar.
Q. It broke off near the hole?
50 A. Yes, sir.
Q. Mr. Witt, this statement signed by you, take this and read from it as to the heights of these draw bars (Here counsel for plaintiff handed witness statement) Read this question and answer (indicating) Tell the jury here the difference, if there was any difference between the height of the draw bar of the link and pin coupler and the draw bar of the automatic coupler of these two cars you speak of?

Mr. MILES: Defendant objects to the question for the reason that it applies after the accident instead of before the accident.

Objection overruled.

Defendant saved its exceptions.

Mr. WITT: After the accident.

Mr. CHEW: Yes, sir.

The COURT: Answer the question Mr. Witt.

A. Your Honor just let me read the deposition for the benefit of refreshing my memory, I have stated in that there was a difference in the height of those draw bars.

Q. I will ask you the question again, tell this court and jury the difference between the height of the draw bar in the east end of the east car of the fourteen-car cut and the west end of the west car of the six-car cut, will you please tell us that?

A. I understand the question.

Q. Answer the question, Mr. Witt?

A. I do not know how to answer that question; there are a good many things in my mind about the accident difficult to remember.

The COURT: Answer the question if you know, and if you do not know, say you do not know.

A. Your honor I do not know now what difference.

Mr. CHEW:

Q. How much did it appear to be to you?

51 A. Mr. Chew, as to the car that had the common draw bar was derailed.

Q. I am talking about after it got back on the rails. How much did it appear to you, and how close were they together when you saw them?

A. I do not know how close they were when I saw them.

Mr. CHEW: Stand aside.

Mr. MILES: Do you desire to ask the witness any further questions?

Mr. CHEW: Not now.

Mr. MILES: Do you intend to at all?

Mr. CHEW: Later, yes sir.

Mr. MILES: I insist on counsel examining this witness in chief.

The COURT: For the present you may cross-examine if you desire, and if for any reason hereafter they should put him on the witness stand, I will pass on it.

Mr. MILES: I asked counsel if it was not his purpose to examine the witness further in chief and he says that he still intends to do so; now, I ask the Court to require him to exhaust his examination in chief to the end that I may cross examine the witness.

The COURT: What is the purpose of putting him on the stand again?

Mr. CHEW: I cannot get him to answer the question.

Q. Tell this court and jury where these cars were standing after they were put on the rail; I am speaking of the west car of the six car cut and the east car of the fourteen car cut?

A. As well as I remember the west car in this cut of six cars was standing about opposite the platform, perhaps, on the main line.

Q. Where was the east car?

A. After it was derailed?

Q. Yes sir.

52 A. I do not remember just its position. It was pulled back on the rail and side tracked; I do not remember how far apart.

Q. I will ask you if on the trial of this case here at the November Term 1900, of this court, you were not sworn as a witness?

A. Yes, sir.

Q. You testified in this case?

A. Yes sir.

Q. I will ask you if you did not testify in the presence of that jury and the court here, you can answer that yes or no?

Defendant objected to the form of the question.

Q. Didn't you testify before the 12 men sworn on this jury before, and the court, and myself, Mr. Buck Neal, Mr. Fitzhugh and Jonathan Neal and asked this question: "After they were put on the side track did you make any examination so as to tell whether one was higher or lower than the other, the draw bars?" And your answer as to that is: "As I stated awhile ago, I did not make any very close inspection of the cars at all." I want you to say whether that question was asked you at the November Term, 1900, of this court?

A. I do not know.

Q. Will you swear that it was not asked you?

A. No sir.

Q. You do not remember that now?

A. I do not.

Q. Was not this question asked you: "You have testified in this case before in your depositions?" And your answer was: "I understand, I was standing away from these cars and it appeared to me that there was a difference in the height of these draw bars." Did you testify that way before this court and that jury?

The COURT: What is the object of this examination?

Mr. CHEW: I want to refresh his memory.

A. My goodness, I cannot come here and positively say whether I heard such a question or made such and such answer; if I did I mean it.

53 Q. Will you deny that that question was asked you?

A. No, sir.

Q. Will you deny that you made that answer?

A. No, sir.

Q. I will ask you if this question was not asked you: "How close were the cars together when you made your observation?" And you answered "I do not know exactly, not far apart, a few inches I suppose; nothing to hold them together." Did you make that answer?

A Perhaps so.

Q. Was it true?

A. My answer is there.
Q. Was it true at that time?
A. If I said so it was to the best of my judgment.
Q. I will ask you if you were not asked this question "A few inches apart?" And you- answer was: "I supposed that the cars were within 5 or 6 inches of each other." Was that question asked you, and did you answer it that way?
A. It may have been asked me and I may have answered it just the way you read.
Q. Yes, that is there. "Could you state, Mr. Witt, the difference, if there was any difference, in the heights of these draw bars in the position they were in, from the top of the rail, at that time? And your answer was "Yes, sir." Could you tell the difference in inches between the heights of those drawbars? And you answered, "I suppose three or four inches difference, just taking a casual observation of them; I told you that I did not make any close inspection; I did not take any measurements?
A. I guess it was, if you read it there.
Q. Did you see them on the side track after they were put on the side track?
A. Your Honor, I might have seen the cars, and might have noted the difference between the heights of the drawbars if there
54 were any, and might have made that statement, and I would like to be relieved from such questions because that has been over three years ago, and I do not remember about all those things, what I want to do is to give the absolute facts as I know them now, and that is what I did.
The COURT: State what you remember now.

Mr. CHEW:

Q. Did you see those cars after they were put in on the side track?
A. Whether I saw them after they were put in on the side track.
Q. Did you see those two cars after they were put in on the side track?
A. I think I did I am not sure.
Q. How close were these cars together when you saw them?
A. I do not know just how close they were.
Q. What is your best recollection about it?
A. My goodness alive, my best recollection about these things.
The COURT: Answer according to your judgment.
A. I did not store those things in my memory.
The COURT: Say you know or don't know or something.
A. I do not know how far they were apart.

Mr. CHEW:

Q. Your best estimate of how far they were apart?
A. I do not know how far apart they were.
Q. Were they an inch apart?
A. That is answering the question if I say yes. Might have been, might be together right now for all I know.
Q. Were they uniform in height or was there a difference in them?

A. I do not know.
Q. Mr. Witt how long have you known Mr. Taylor?
A. Four or five years.
55 Q. What kind of a man was he as to work?
A. An exceptionally good man.
Q. You remember that?
A. Yes, sir.
Q. How many days did he work in the month?
A. Very regularly, I do not remember how many days.
Q. What did he earn per day as a brakeman?
A. That would depend upon the number of miles he would make in a day.
Q. I want per month?
A. About $70 or $75, between $65 and $80 for a full month's work.
Q. What character of man as to energy?
A. A very energetic man.
Q. How old a man did he appear to be?
A. About 26 or 27.
Q. You remember that?
A. Yes sir.
Q. What kind of a man did he appear to be as to health?
A. Very strong robust healthy man.
Q. What character of man as to sobriety etc.?
A. He did not have one single bad habit as I know of.
Q. Did he drink?
A. No sir.
Q. Chew?
A. Never saw him.
Q. Every about his family or house any?
A. Yes sir.
Q. How often?
A. May be once or twice a week.
Q. Acquainted with his wife?
A. Yes sir.
56 Q. Is she in the Court room now?
A. Yes sir.
Q. How long has it been since you have seen her?
A. I do not know about a year I presume.

Mr. FITZHUGH:

Q. Mr. Witt you gave your deposition when you testified in our office shortly after the accident happened?
A. Yes sir.
Q. Do you know whether you testified at that time as to the difference in the heights of the two draw bars in the two cars?

Defendant objects to this on the ground that the matter had been thoroughly gone over by the witness.

The Court ruled that this Counsel may examine the witness on the same thing, to which the defendant excepted.

Mr. FITZHUGH:

Q. Do you remember signing this deposition?

A. Yes sir.

Q. I will ask, was this question asked you, "Did you examine the heights of each of these two draw bars immediately after Taylor was killed, and before anything had been done to them, I mean the draw bars on the two cars between which Taylor was killed" and you answered, "yes, but did not measure them; the automatic coupler appeared to be about four inches lower than the common coupler." Did you state that at the time?

A. My signature is there.

Q. Was that true Mr. Witt?

A. Yes according to my judgment then.

Q. You think now it is true.

A. I think if I made it then, I gave it for a fact, according to my best judgment.

Q. You signed it?

A. I did.

57 Q. You thought it was the fact?

A. I evidently did.

Q. You still think it was the fact?

A. I still think it was a fact if I made it then.

Q. Mr. Chew asked you if you testified on the other trial if there was a difference of three or four inches between the cars?

A. He asked me about that.

Q. Your answer on that occasion was true?

A. I guess to the best of my judgment.

Q. Your estimate was better then?

A. Yes sir.

Q. If you stated it on that occasion it was true and still is true?

A. That is the way I gave it.

Cross-examination.

By Mr. OSCAR L. MILES:

Q. When you examined those cars it was after the accident?

A. Yes sir.

Q. Did you make any examination before the accident?

A. No sir.

Q. Is it not a fact that these cars when they came together were very badly wrecked at the time you made your examination?

A. I do not remember Mr. Miles the condition of these cars, except that this car had a broken draw bar.

Q. You remember whether the automatic coupler was mashed down or not?

A. I do not.

Q. That is the one you stated was the lowest when you looked at them?

A. Yes sir.

Q. (Here Mr. Miles presented photograph of cars to witness.) Is that one of the cars, 11962?

58 A. Yes sir.

Q. Does that look like what you saw after the wreck?

A. I would not state positively that it was.

Q. I will ask this question, that dead wood is mashed down?

A. Yes sir.

Q. This corner ought to be up here?

A. Yes with this corner up here.

Q. Appears to be mashed down there about how many inches would you judge?

A. Appears to be mashed down four or five inches. About four inches top is mashed.

Q. That would lower the draw bar that much?

A. Not quite so much, because this would be lower here than this.

Q. It would lower the draw bar?

A. It would lower the draw bar perhaps three inches or more.

Q. This far (indicating on photograph).

A. Yes sir.

Mr. MILES: Gentlemen I will introduce these photographs in evidence when I come to my case.

Q. The examination of the draw bars you made was subsequent to the wreck?

A. Yes, sir.

Q. The hole you speak of in the stem of the old link and pin coupler was the orifice running through the center?

A. Yes, sir.

Q. The link and pin coupler was broken off right at the shoulder flush with the ends of the car?

A. With the dead wood, yes, to the best of my recollection.

Q. You cannot tell the jury whether there was any difference between those draw bars prior to the wreck?

A. No sir.

59 Q. You made no examination prior to that time?

A. No sir.

Q. Your attention was not called to it?

A. No sir.

Q. You said awhile ago that you had made couplings going four or five miles an hour?

A. Yes sir.

Q. Did you ever make a coupling, Mr. Witt, coming together so fast that it broke the draw bar off?

A. I do not believe I ever did; no, sir.

Q. Did you ever make a coupling when the cars came together so fast that it broke the dead wood off the cars?

A. No sir.

Q. Did you ever make a coupling when the cars were coming together so hard that it mashed the draft timbers down?

A. No, sir.

Q. Did you ever make a coupling when the cars came together so fast that it broke the draw bar off, mashed off the dead wood into splinters, and burst into splinters the ends of the draft timbers?

A. No, sir.

Q. Did you ever make a coupling when the cars came together so hard that it burst the end of the car out and burst the end of the roof off of both cars?

A. I never had an accident from making any coupling?

Q. You say you have been railroading ten years?

A. Yes sir.

Q. Tell the jury from your experience as a trainman of ten years, what would cause the breaking off of a draw head, mashing down of the draft timbers, breaking a knuckle, mashing the dead wood, bursting the ends of the cars, and bursting the ends of the roof off?

A. Coming together with great force would do that to any part of the car you mentioned with sufficient force; I have seen it done.

Q. If you add to that the fact that one of these cars was
60 thrown off the track, and runs 42 feet quartering across the track over the ties and in the cinders of the yard, what would that indicate?

A. Well, I will tell you, it would indicate speed, but not necessarily speed; it would indicate maybe the force behind it; and another thing taking into consideration the condition of the ground it was running over too.

Q. Mr. Witt, if you saw a coupling made in such a manner as to break off the draw head, burst into splinters the draft timbers, mash into splinters the dead wood, break a knuckle off the automatic coupler, burst the end off both cars, burst the roof off and knock the cut back up the track about four or five car lengths throw car off track and run forty two feet quartering across the track, what would that indicate?

Mr. CHEW: We object because that would be expert testimony as to this state of facts; that would be a matter of common knowledge, and not a matter subject to expert testimony.

The COURT: It is inadmissible for the present; you might pass it.

Mr. MILES: I will prove every one of these facts, if not, I will strike it from the testimony. I am asking him as an expert trainman of ten years' experience.

The COURT: I am not sure it is a matter of common knowledge, and will let it go.

Mr. MILES:

Q. What would it indicate?

A. It would indicate that these cars came together with some force.

Q. They will not come together without some force; it takes force to bring them together?

A. Yes sir.

Q. They are not mashed up that way in ordinary couplings?

61 A. No, sir.

Q. What would that indicate, tell this jury if you have

any opinion? Would that not indicate that that was an extraordinary forceful coupling?

Mr. CHEW: We object on the ground that that would be his opinion.

Mr. MILES: Yes, that is what I am after.

A. If I answered that question I would want to say then what indications were on that link and on that draw bar and the cause of this damage, taking all these things into consideration in this particular case.

Q. What is your opinion as to the character of force? I am putting a hypothetical question?

The COURT: For the present the question will be excluded. If the basis is laid I will pass on it when we come to it.

Mr. MILES: I think I am entitled to ask this question on cross examination. The court refuses to allow counsel for defendant — cross-examine the witness as to the force with which the cars came together at the time of the accident.

The COURT: No, sir, I refuse to permit him to answer the question propounded on that subject either as a hypothetical question or a part of the cross-examination.

Defendant saved its exceptions to the rulings of the Court.

Redirect examination:

Q. What was the car in the east end of the fourteen-car cut loaded with?

A. I do not remember now?

Q. Was it a loaded car?

A. I think it was.

Q. What was the car on the west end of the six-car cut loaded with?

62 A. I think with lumber, if I am not mistaken.

Q. What is your best recollection about the car on the east end of the fourteen-car cut being loaded with shingles?

A. I do not know.

Q. It was a loaded car?

A. Yes, sir.

Q. Where were they destined to go?

A. I do not know.

Q. To be stopped in the Indian Territory or to go beyond?

A. If I could answer that question I could answer the other.

Q. Where did you leave these cars?

A. I think they were left at Sallisaw; I know the east car was.

Q. Do you know whether they were loaded with stuff to go beyond the Territory line?

A. No, I do not.

Q. Do you recognize that picture?

A. I recognized the picture Mr. Miles showed me.

Q. Do you know when it was taken?

A. No, sir.

Q. Any photographer there that day?
A. Not to my knowledge.
Q. Do you know whether one of the cars was carried on in that train that evening or not?
A. No, I do not.
Q. Do not remember that?
A. I do not remember whether it was carried on then or not.

63 *Testimony of Chas. Lattin.*

CHARLES LATTIN, a witness for the plaintiff, being duly sworn, testified as follows:

Q. What is your name?
A. Charles Lattin.
Q. How old are you?
A. Thirty-seven.
Q. Where do you reside?
A. Coffeyville, Kansas.
Q. Are you the conductor of the train that left about the 18th day of January 1899, for Coffeyville, Kansas, No. 265?
A. I believe I was about that time.
Q. Know about what time you left here?
A. No, I do not exactly; I think between two and three o'clock; sometime in the afternoon.
Q. Did you know George Taylor in his life time?
A. Yes, sir.
Q. Was he employed on that train?
A. Yes, sir.
Q. In what capacity?
A. Brakeman.
Q. Where was his post of duty on that train?
A. Rear brakeman, I think.
Q. What you ordinarily call a caboose brakeman?
A. Yes, the flagman; worked on the rear of the caboose.
Q. Do you know where Sallisaw, Indian Territory, is?
A. Yes, sir.
Q. On what line of railroad?
A. On the Iron Mountain.
Q. A station on the St. Louis, Iron Mountain and Southern?
A. Yes, sir.
Q. Do you remember what your train consisted of that day?
A. I could not state exactly; 22 or 23 cars.
64 Q. Have you your train book with you?
A. No, sir.
Q. Do you know where it is?
A. I think it is at the Train Master's office down here; call them in once a month.
Q. How long did you keep this train book you had on that day?
A. I guess I had it a couple of years before they called them all in.
Q. Turned it in at the office?

A. Yes, sir.

Q. Did you have any freight in that train that day for Sallisaw, Indian Territory?

A. Two cars, I believe.

Q. Loaded or empties?

A. Loaded.

Q. Do you remember who the engineer was that day?

A. Tom Constant.

Q. Who made up your train here in the yard?

A. I do not know the yard crew. I believe Joe Curtice was the Yard Master; I believe the yard crew made the train up; of course he was in charge.

Q. How much switching did you do at Sallisaw that day?

A. Enough to set out two cars; made two switches.

Q. You say you left Van Buren sometime between two and three o'clock, do you remember the time you arrived at Sallisaw?

A. Must have been about four o'clock, about an hour and a half for the run.

Q. Did you stop between here and Sallisaw that day?

A. We stopped at Cherokee Junction; register there always.

Q. Where is Cherokee Junction?

A. About six miles out.

Q. West of Van Buren?

65 A. Yes, sir.

Q. Did you stop anywhere between here and Cherokee Junction?

A. I do not think so; I do not remember.

Q. From Cherokee Junction, did you make any other stop until you got to Sallisaw?

A. I do not think we did.

Q. How far is it from here to Sallisaw?

A. A fraction over 28 miles.

Q. Anything out of the ordinary or usual course of business occur between here and Sallisaw that day?

A. No, sir; I think not; I do not remember anything occurring.

Q. Who did the switching when you got to Sallisaw that day, who opened the switch stand at the west end of the switch?

A. I think brakeman Marshall threw the switch.

Q. When he threw the switch the first time from the main line to the side track, how many cars did you put on the side track at that time?

A. One I believe.

Q. Where was that car as to the train; what car was it back east from the engine?

A. I do not know; I think seven cars from the caboose; I do not remember whether we had 21 or 23 cars.

Q. Did you leave some cars on the main line that day?

A. Yes, we left six, I think, and the caboose on the main line.

Q. The first car you put on the side track was the seventh car from the caboose?

A. I think it was the seventh car.

Q. Was it a loaded or empty car?
A. Loaded car.
Q. What kind of car was the sixth car from the caboose standing on the main line, if you remember?
A. Box car.
66 Q. System car?
A. Not positive whether it was a system car or not.
Q. Was it loaded or empty?
A. I think it was a loaded car.
Q. What was it loaded with?
A. Lumber I think.
Q. Where was it destined?
A. I could not state exactly some point in Kansas or Nebrasks.
Q. Do you remember the character of the draw head, it had in the west end of the car?
A. No. 2, draw head, Missouri Pacific automatic coupler.
Q. When you went to make this second switch into the side track what was done up at the west end—kick any cars back east?
A. Down the main track?
Q. Yes, sir.
A. I think car kicked down main track.
Q. Do you remember how many?
A. Eleven or twelve in that neighborhood.
Q. Where were these cars when being kicked back to the west end of the switch, were they east or west of the switch?
A. West of the switch.
Q. Went into the side track with these cars, pulled out of the side track on the main line, that took you up west of the switch.
A. Yes over the switch.
Q. The switch then was thrown to the main line?
A. Yes sir.
Q. How many cars did that leave then with the engine?
A. Three or four or five.
Q. A few cars attached to the engine?
A. Yes a few.
Q. Tell the jury what you mean by kicking?
A. It is to start the cars to going and give them speed
67 enough shoving them with the engine as far as you want to and cut them off.
Q. Release them from the engine and then they roll with their own momentum.
A. Yes sir.
Q. What was the character of the track from the west end of the switch back this way up or down grade?
A. Slightly up-grade, a very little bit coming east.
Q. Where were you at the time the cars were uncoupled and the kick given to them to send them back east?
A. I was on top of the car before they were cut off.
Q. What kind of car was that on the east end of these 11 or 12 car cut?
A. Loaded car.

Q. What was it loaded with?
A. Lumber I think.
Q. Do you know where it was destined?
A. No I do not I think somewhere in Kansas.
Q. Both these cars the car on the east end of the 11 or 12 car cut and the car on the west end of the six car cut were going through the Indian Territory to Kansas?
A. I think they were, my train book will show, my memory is not fresh on that point, but I think they were going through.
Q. When you say you think they were going through, you mean into the State of Kansas?
A. Yes sir.
Q. Is Coffeyville the end of the division?
A. Yes sir.
Q. In what State is Coffeyville?
A. Kansas.
Q. How far is Coffeyville west of the Indian Territory line?
A. About two miles, nearly that.
Q. When these cars were cut and started back your recollection is that you were on top of the cars?
68 A. Yes, I was on top of the cars.
Q. What was the character of the draw bar in the east end of the 11 or 12 car cut?
A. Link and pin coupler.
Q. Mr. Lattin will you be kind enough to describe to the jury what you mean by a link and pin coupler?
A. Draw head that has a hole in it for the link, and a pin to drop down to hold the link in the draw head.
Q. This is what you call the old style?
A. Link and pin coupler, link and pin drawhead, automatic call them couplers instead of drawheads.
Q. What was the side of the mount of this link and pin coupler?
A. I don't know exactly.
Q. About.
A. I suppose two inches, or two and one half inches something like that.
Q. I mean its width?
A. I suppose four or five inches.
Q. Do you know about what the size is?
A. You mean of the end of the coupler?
Q. Say this is the coupler (illustrating) about what is the width on top here?
A. I suppose about eight inches. I could not be accurate on that.
Q. From the top side down to the bottom side, how thick would that be. I asked you if you do not know?
A. About how thick?
A. About six inches.
Q. What is the size if you know of an automatic coupler?
A. I do not know the exact size.
Q. About what size?
A. I suppose about eight inches.

Q. On the face on the top across this way?

69 A. I suppose ten inches fully, width of the coupler.

Q. From the top side down to the bottom side, how thick?

A. About eight inches, probably more, probably less.

Q. Which is the thickest, the link and pin coupler or automatic

A. The automatic coupler has the widest face on the end of the coupler.

Q. About how much wider is it?

A. About two inches.

Q. How much thicker?

A. About the same.

Q. About two inches thicker?

A. Yes sir.

Q. Did you have any hot boxes between here and Sallisaw that day?

A. I do not remember of having any.

Q. You say you think you were on top of the cut of cars kicked back, what car were you on?

A. I was on the east car.

Q. Where did you get on?

A. Somewhere along about the clearing post, about four or five cars probably from the switch stand.

Q. What rate of speed were the cars running at the time you got on?

A. Oh, any where from three to six or seven miles per hour, I did not pay much attention to it.

Q. You caught the first car that came to you?

A. Yes sir.

Q. What car in the 11 or 12 were you on?

A. East car.

Q. Which end of the car do you mean?

A. I do not know, I do not recollect.

70 Q. Did you see George Taylor down in the field there anywhere at the time you got on?

A. Yes sir, somewhere down east of the car that I was on.

Q. Between the switch stand and the depot?

A. Yes sir, down in there somewhere.

Q. Did he do anything to these cars as they came down there, did he get on them?

A. The cars I was on.

Q. Yes sir.

A. No sir.

Q. On the 11 or 12 cars?

A. No sir.

Q. Where was the west end of these six or seven car cut as to the depot?

A. It was west of the depot.

Q. How far?

A. I guess I do not know 8 or 10 cars; six or seven cars something like that.

Q. How many car lengths was it from the depot up to the switch stand west of the depot?

A. I do not know.

Q. About how many feet would you say?

A. I can come nearer telling in car lengths than in feet.

Q. About how many car lengths?

A. I suppose it must be twenty car lengths.

Q. When you got in this car you say you recollect you were down about the clearing post?

A. Yes sir in that neighborhood.

Q. Do you know where the west car of the 10 or 11 car cut was when you got on as to the switch? Had it passed over the switch?

A. Just passed over the switch.

Q. I mean the car on the west end of this cut. The east car had passed over; was the west car over the switch or not?

71 A. I could not say whether it was or not; I do not think it was.

Q. About how many car lengths was it from the switch up there at the west end to the side track down to the clearing post?

A. I think about three car lengths, probably more than that, probably four; I do not know what that lead is there.

Q. If there were eleven cars in the cut, there were at least ten cars west of you when you got on?

A. Yes, if I got on at the clearing post; I got on in that neighborhood.

Q. Tell the jury whether these cars increased their speed from the time you got on, or diminished it.

A. I suppose they increased the speed for a short time because the engineer was working the steam.

Q. Was he still kicking them?

A. Worked steam until I gave a slow signal, and then shut off as soon as he shut off it decreased the speed, kind of coming up grade coming east.

Q. How far were you from the west end of the six car cut when you gave him the slow signal?

A. I don not know.

Q. How long had you been on the car when you gave the slow signal?

A. I cannot state, not long tho-.

Q. After he took the engine away from them and shut off steam they began to decrease the speed?

A. Naturally so, kind of up grade.

Q. You do not recollect where George Taylor was.

A. No sir I cannot state exactly.

Q. When he got on the cars did you see him?

A. Not until I got straightened up; was working steam, and I gave a slow signal.

72 Q. Where was he when you saw him?

A. He was between me and the other cut of cars on the main line.

Q. About how far from you?

A. I do not know how far.

Q. How far from the six car cut were the cut of cars you were on when you noticed him?
A. I do not remember.
Q. Your best recollection?
A. I say 5 or 6 or 7 probably 8 cars.
Q. Somewhere between six and eight cars?
Q. Somewhere between six and eight cars?
A. I should judge so, yes.
Q. You state here that Taylor did not get on that cut of cars?
A. No sir.
Q. Did you see him do anything after you straightened up, and looked down there and saw him?
A. No, he was walking toward the cut of cars I was on.
Q. Where was he as to the main track?
A. He was between the rails of the main track.
Q. Coming west towards you?
A. Yes sir.
Q. Did he meet these cars?
A. Yes sir.
Q. What did he do if anything when he got to them?
A. Took the link out of the common draw bar and placed it in the automatic and walked back.
Q. He went in between the cars on the main track, took the link out of the common draw head and started back towards the car with the automatic draw head?
A. Yes sir.
Q. That was the car you were riding?
A. Yes sir.
Q. The east car in the 11 or 12 car cut?
A. Yes sir.
73 Q. When he took that link out, how far was he from these 11 cars?
A. I suppose they were probably one car length, one and a half maybe two.
Q. What did he do when you saw him start back towards the automatic coupler, did he walk or trot?
A. I do not remmber, George was a very fast worker, I do not remember whether he walked or ran. I cannot state that.
Q. What did he do with this link after he took it out?
A. Put it in the automatic coupler.
Q. Did you see him do anything?
A. Stood there and waited for the cars to come down so he could couple on.
Q. Did he have anything in his hand?
A. Probably had a link, naturally would pick up the link.

Mr. MILES: We object to that.
The COURT: Answer the question.

Q. Did he have anything in his hand you remember of?
A. At that time?
Q. At the time the cars were coming together, and he had gone back to the automatic coupler?
A. I cannot answer that I do not recollect.

Q. You say he put this link in the automatic coupler did you see him do that?

A. Yes sir.

Q. What did you do to these cars at the time; did you do anything; you say he took the link out of the common link and pin coupler; what did you do to these cars if anything?

A. I believe I — taken up the slack on the brake, the brake was on the end of the car.

Q. Which end of the car?

A. On the east end of the car.

Q. You took up the slack?

74 A. I took up the slack.

Q. What do you mean by taking up the slack?

A. To get the chain wrapped up so as to be ready to take hold when you set the brake.

Q. Did these cars still approach the six cars standing on the main track?

A. Yes they were moving.

Q. At what rate of speed were they moving?

A. I do not know exactly; man on top of the car not looking for an accident to occur would not know the speed.

Q. Did Taylor say anything to you?

A. Told me to come a little bit.

Q. What was his language?

A. He said "let them roll a little bit Charlie" then I unwound the brake.

Q. Would that increase the speed?

A. No sir.

Q. When the cars got up here pretty close together, what did you observe if anything, that Taylor did?

A. I saw him pick the link up and try to enter it.

Q. Where?

A. In the common draw head.

Q. What did he do then?

A. He made a move as to get out.

Q. How?

A. Made a motion to get out.

Q. Could he have put the link in the common draw bar at that time?

Defendant objected.

Q. You say he had the link in his hand?

A. Yes I saw him pick the link up.

Q. What was his motion as to the link?

75 A. He tried to get it in the draw bar. From where I was standing. I was standing directly over him.

Q. At the time he picked up the link—you say he picked up the link?

A. He raised it up it was fastened at one end.

Q. In what?

A. The automatic coupler.

Q. Picked it up at just one end.
A. Yes sir.
Q. Was that when he said let them come a little?
A. I do not remember whether it was before or after, it must have been before; the cars were quite a little way apart when he said that.
Q. Picked up the link you say, and had one end in his hand?
A. Yes sir.
Q. How high did he raise the link?
A. I do not know how high he could have raised it.
Q. He raised the link?
A. Yes I could see he raised the link.
Q. How far was the car that had the common link and pin coupler in it from him, at the time he raised the link?
A. I do not know.
Q. About how far?
A. I say two feet, or three feet, or four feet, very close.
Q. You say the cars were in three or four feet of each other, when he raised the link?
A. Short distance away; I should judge three or four feet.
Q. Did you observe the condition of these draw heads at that time?
A. I could not very much from the top of the cars, of course I saw the draw heads looking down on them.
Q. If either one appeared to be higher than the other state which one it was?
76 A. The automatic appeared to be higher because it was wider from my position on top of the car.
Q. How much higher did it appear?
A. I do not know.
Q. How did that common draw bar appear to you as to the relative height of the other draw bar?
A. I could not state exactly; I was looking right down upon it, I could not tell at all.
Q. How did it appear to you Mr. Lattin, from your best recollection about it?
A. It appeared to be lower on account of the other one being the thickest.
Q. Which one?
A. Common draw bar.
Q. Appeared to be lower?
A. I cannot tell exactly.
Q. Which one appeared to be lower to you?
A. The common draw bar on account of the automatic I suppose being higher, having a wider face on it.
Q. In inches or feet or distance of some kind, which one of these draw bars appeared to you to be higher?
A. You speak from the draft line?
Q. From the center of the draw bar?
A. The center of the draw bars, I do not know I could not see the center of the draw bars.

Q. Which one appeared to be the highest?
A. I said before the automatic coupler appeared to be the highest because it had a thicker face.
Q. How much higher did it appear to be?
A. I cannot tell you
Q. About how much higher?
A. I cannot answer that
77 Q. You did answer it once?
A. May be an inch or two inches or three inches.
Q. Did it appear to be two or three inches higher?
A. I did not say it appeared to be two or three inches higher.
Q. About.
A. The difference in the height of the draw heads I cannot say how much.
Q. How much would you say?
A. I do not like to answer that question I do not know how much it was.
Q. As it appeared to you?
A. I say an inch and a half or two inches.
Q. Somewhere between an inch and two inches.
A. That is my recollection of it.
Q. Did you examine these cars afterwards?
A. Not for quite a while afterwards.
Q. How long?
A. I say thirty minutes or an hour.
Q. Where did you find the link?
A. I did not find the link, brakeman handed me the link.
Q. What condition did you find the link in?
A. Found one draw head broken off, and one part of the automatic coupler broken off.
Q. Part of the automatic coupler knuckle was broken off?
A. Yes sir.
Q. What was the appearance of the top of this draw bar? What was the appearance of the automatic coupler at the time you examined it?
A. Coupler part was all right, knuckle was broken.
Q. Did you find any bright places on the iron there anywhere?
A. I believe there was a scratch or two on the draw head.
Q. Which one?
78 A. Automatic—I am not positive now.
Q. Where did you notice the scratch; on what part of the draw head, top or side?
A. I think the jaw had scratched on it I think on the side on the corner.
Q. Did you examine the broken parts of the link and pin coupler.
A. No I do not believe I did.
Q. What brakeman handed you this link?
A. Brakeman Marshall.
Q. What was the condition of the link?
A. It had a bright place on top of the link, I suppose, a bright mark on the link.

Q. How long was that link?
A. Twelve or fourteen inches.
Q. Over what extent of the surface of this link was the bright spot?
A. On the side of it.
Q. Say this is the link here, this piece of paper?
A. On the flat side of the link.
Q. Was both sides bright on the top?
A. On top is all I noticed; I suppose it was the top; it was on the flat side of the link.
Q. Suppose my fingers was the link representing this prong, this is the top side and that the bottom side, or reverse it, was it on top, that is, on this part of the prong, was that where it was bright?
A. Yes, both were bright.
Q. You say this link was how long?
A. 12 or 14 inches, I suppose.
Q. How far up on this link were these bright marks?
A. I do not remember.
Q. Half of it?
79 A. I cannot say, but a part of it was bright.
Q. What effect did these cars coming together have on George Taylor, if anything?
A. You mean on his person?
A. Yes sir.
A. They killed him.
Q. Did you see him when he was caught?
A. I saw him just about the time he was caught.
Q. Which side of the track was he caught on?
A. On the left hand side going east.
Q. That would be on the south side?
A. North side.
Q. On the left hand side coming from Sallisaw this way?
A. Yes, sir.
Q. Is that the side of the track on which the side track is?
A. No sir.
Q. Is that the side the depot is on?
A. The depot is on the left hand side.
Q. Caught in between the cars on the depot side?
A. Yes, sir.
Q. How far west of the depot?
A. Six or eight or ten car lengths.
Q. How far was it from the depot up to the switch stand at the west end of the switch?
A. About twenty car lengths.
Mr. MILES: That is to the switch stand?
A. Yes, sir.

Mr. CHEW:

Q. These cars were standing west of the depot?
A. Just west of the depot.

Q. What condition were these cars in when you examined them after the death of Taylor?

80 A. Draw head was broken off, top part of the knuckle broken, roof boards damaged and some end boards, and one car off the track.

Q. Which car was off the track?

A. The car I was riding.

Q. The one with the common link and pin coupler?

A. Yes, sir.

Q. Did you examine Taylor's body after you got to it?

A. No, sir.

Q. Did you examine his head?

A. He fell with his face down and I could see that it caught him here.

Q. Could you tell the character of the wound in the back of the head?

A. No, I did not examine it close enough to tell the character of it.

Q. Is there such a thing on the end of these cars as a grab-iron?

A. Yes, on the end of all cars.

Q. Grab-irons on the ends of these cars?

A. Yes, sir.

Q. Did you examine the grab-iron on these cars afterwards?

A. I saw some hair on it where it caught him.

Q. What part of the grab-iron caught him?

A. Lower part of the grab-iron where it makes a curve, it is set on a horizontal basis about 45 degrees angle; some are.

Q. About this?

A. On an angle.

Q. How long was that grab-iron?

A. I suppose twenty inches; some two feet.

Q. Did they protrude out from the body of the car so as to let the hand grab it?

A. Yes.

81 Q. What part of the grab-iron did you find the hair on?

A. Lower end of it where it makes a turn out from the car.

Q. What was done with the car that was on the west end of this six-car cut that day?

A. Both left at Sallisaw.

Q. Where did you set them?

A. Over on what is known as the business or commercial track, on the house track there.

Q. Was it on the right hand side of the track or left hand side going west?

A. Left hand side going west.

Q. Over next to the business part of town?

A. Yes, sir.

Q. Do you know what the standing car was loaded with?

A. I cannot say exactly, I think some forrest product.

Q. Know whether it was lumber or shingles?

A. I do not know.
Q. Both were loaded cars?
A. Yes, loaded cars.
Q. About what age was George Taylor?
A. I have forgotten, between 24 and 26 years of age, I think.
Q. What was his habits as to industry?
A. He was a very industrious man along the road doing his work.
Q. Did he work all the time he could get work, or not?
A. I think he worked all the time he could, unless sickness prevented.
Q. What was his habits as to drink?
A. I never saw him take a drink in my life and do not think he drank anything.
Q. How much was he earning per month at the time of his death?
A. I supposed he averaged sixty-five or seventy dollars, some months sixty and some months ninety, some months more than that probably. Averaged $70.00 or $75.00 per month per year.
82 Q. After you noticed the common link and pin coupler broken off, what was its position as to the automatic coupler, on top of it or under it?
A. Broken off and fallen down on the middle of the track.
Q. What did these two draw bars do when the cars came together and you turned to walk away, when you last noticed them?
A. The best I could see, passed each other kind of to the side and over the top.
Q. How did that appear to you as to clearing the common draw bar, went on top of the automatic or to the side of it?
A. In the automatic coupler there is an opening, what is called a jaw, space in there that fits in the knuckle, draw head appeared to go in this opening of the automatic coupler.
Q. As soon as you saw that what happened?
A. I saw an accident of some kind was going to happen and turned away. Last time I saw him the draw head had started in this opening.

Cross-examination.

—. Mr. Chew said something a moment ago about lateral motion; there is always lateral motion in the play of draw heads?
A. Yes, sir.
Q. It is absolutely necessary.
A. Yes, sir, for the curvature of cars.
Q. Up and down motion in them, between them?
A. Yes, sir.
Q. How much?
A. Varies from half inch to two inches.
Q. Is it not a good deal more than that?
A. It may be.
Q. Don't the company furnish you steel shims to put on them an inch and an inch and one half thick?
A. Yes, I have seen them two inches thick.

83 Q. When you start to put in a shim, you raise the draw bar and place the shim over the carrying iron and the draw head locks the shim?

—. ——.

Q. You stated awhile ago that you thought the automatic coupler was wider than the link and pin coupler?

A. That is my best recollection.

Q. These were both system cars?

A. Yes, sir.

Q. Are not all these draw-bars built to standard and all the same size?

A. I never knew a link and pin coupler being standard; automatic coupler had a standard.

Q. Did you ever see a link and pin coupler that was larger or smaller than any other link and pin coupler on this System?

A. I do not know as I ever did.

Q. Can you tell the jury that you ever saw a link and pin coupler that was wider or narrower than nine inches on this System?

A. I cannot; I said awhile ago that that was about the width; I cannot state exactly.

Q. Is not Missouri Pacific No. 2 automatic coupler exactly nine inches wide up and down?

A. Never did measure one

Mr. CHEW: You mean nine inches thick.

Mr. MILES: I mean up and down. I will say vertically.

Q. Is not the Missouri Pacific No. 2 automatic coupler exactly nine inches through the face up and down?

A. I cannot answer because I have never measured one, and never heard it answered before.

Q. When you speak about one being wider than another, it is simply your opinion?

A. Yes, I said awhile ago it was my opinion.

Q. You do not know whether or not they are built to a standard.

84 A. No, sir, I do not.

Q. You do not know what the standard is?

A. No, sir.

Q. When you were talking about these draw bars, one appearing to you from the top of the car to be higher than the other, I believe you stated to the jury that the automatic coupler appeared to be the wider, because you saw more of its face?

A. Yes, sir.

Q. You could not see any of the face of the link and pin coupler?

A. No, sir.

Q. When you talk about the height of draw bars in railroading, what do you mean?

A. They are figured from the draft line.

Q. What is the draft line?

A. The center of the draw head.

Q. The draw head shank?

A. The draw head shank.

Q. The center of the draft line is the center of the draw bar shank?

A. Yes, sir.

Q. And that is measured from what?

A. From the top of the rail.

Q. From the top of the rail to the center of the draw bar shank?

A. Yes, sir.

Q. Can you tell the jury whether there was any difference in the heights of the centers of the draft lines between these two cars before they came together?

A. No, sir, I cannot.

Q. After they went together were they badly wrecked?

A. Yes, sir.

Q. Can you tell the jury what was the matter with the one that had the automatic coupler in it?

85 A. I can tell partly, had the top parts of the knuckle broken off, and there was some end boards damaged. I think probably the buffer block was damaged.

Q. Was not the south end of the buffer block mashed all to pieces, down below the floor of the car?

A. South end.

Q. Right hand end as you come this way, the side opposite the depot?

A. You are speaking about——

Q. The automatic coupler.

A. I do not remember now it was damaged pretty badly.

Q. Was it not mashed into splinters?

A. Several parts mashed down there.

Q. I am talking about the dead wood?

A. Buffer block.

Q. Yes sir.

A. I say it was damaged some, I do not know.

Q. You not will say that it was mashed all to pieces? so part of the corner was below the floor of the car.

A. That probably was; I think that draw head was mashed down and that probably pulled the buffer block down.

Q. Anything wrong with the draft timbers on that car?

A. Mashed down.

Q. What was the number of that car?

A. I do not remember.

Q. Do you not recognize that as one of the cars (exhibiting photograph)?

A. Yes, I believe that is the Iron Mountain car, if I remember correctly.

Q. That is the one that had the automatic coupler in it.

A. Yes pulled the draft timber down, pulled this down also.

Q. Mashed all to pieces?

8 A. Yes I said it was damaged awhile ago.

Q. You cannot tell the jury whether there was any difference at all between the heights of the draft lines of these two cars?

A. No sir.

Q. Is it not a fact that your position on top of the car gave you a very poor opportunity to make any observation of the heights of the draw bars?

A. Yes sir.

Q. You tell this jury that you stayed there until these cars struck?

A. They were coming together, yes sir.

Q. Where did you go?

A. I went to the other end of the car.

Q. Back the way they were coming from?

A. Yes sir.

Q. How far did it knock these six cars and the caboose when they struck?

A. I think it knocked them back, I do not know exactly, something like three or four car lengths.

Q. Didn't it knock the caboose clear back on the crossing?

A. I do not think it knocked it quite that far back.

Q. Give your best judgment?

A. I cannot be accurate about that.

Q. Don't you know where they stopped up there?

A. They stopped somewhere between the two crossings.

Q. Do you remember whether it knocked one car back east of the depot?

A. Yes I think one went back east of the depot.

Q. And west of the depot is where they struck?

A. Yes sir.

Q. In addition to the damage to these cars, you say one car was off the track?

A. The car I was riding went off.

87 Q. The car with the link and pin coupler?

A. Yes sir.

Q. Notice how far it ran after it went off on the dirt?

A. I did not measure it.

Q. Were you there when the cars were photographed that evening?

A. No sir, I do not think I was.

Q. How long did you stay after the wreck?

A. I suppose I was there an hour and a half probably.

Q. Were you there when the interchange car inspector inspected the cars and measured them?

A. Yes sir.

Q. What was his name?

A. I forgot his name.

Q. M. D. Sanders?

A. I believe it was Sanders.

Q. He was employed in the Kansas City Southern and the St. Louis, Iron Mountain and Southern Railway Company?

A. Yes sir.

Q. At that place?

A. Yes sir.

Q. How long was it after the accident that he came down there and inspected the cars?

A. In a very few minutes.

Q. Was he not right there on the ground?

A. Right near the depot, three or four minutes or something like that.

Q. Were you there when McPherson, car inspector from Van Buren, came there and made his inspection and measurements?

A. No, I had gone on.

Q. You said while ago that these cars were loaded with forest products?

A. That is my best recollection.

88 Q. Was not the car standing still loaded with lumber?

A. We call that forest products, I think it was lumber.

Q. Was not the approaching car loaded with Cypress shingles?

A. I think it was shingles.

Q. Didn't the car with lumber in it show that it had full tonnage, while the other showed two-thirds?

A. One was loaded to full capacity, and the other had a light load.

Q. How fast were they running when they hit Charlie?

A. Between from four to seven miles per hour.

Q. Are you certain that George Taylor was not riding that cut of cars you were on?

A. I am positive of that.

Q. Is it not a fact that George rode the cut of cars down jumped off, ran forward and put the link in the automatic coupler?

A. He rode the cars down the passing track.

Q. I am talking about down the main line?

A. No he did not.

Q. Wasn't you up on top of the car jumping up and down giving a stop signal when they come together?

A. No sir I threw up my hands and gave a slow signal when they cut off.

Q. I am talking about the moment they struck, wasn't you on top of the car giving a vigorous stop signal?

A. No sir.

Q. When the cars struck what did you do?

A. I went to the other end of the car and got off, I felt the car I was on was off the track.

Q. Just turned around quickly and went back?

A. I ran.

Q. As soon as they struck, you turned around and ran to the other end of the car?

A. Yes, and got off on the side the depot was on.

89 Q. Were you holding the brake at the time they struck?

A. I turned just before they struck and braced myself.

Q. At the time they struck?

A. I had just raised up.

Q. How did you brace yourself, stand up and show the jury?

A. Had hold of the brake bent over like this, I threw myself back, kind of this way with my hands on the brack wheel.

Q. While you had hold of the brake wheel you could not look down there?

A. I could still see over the end of the car; you might say that was about the instant they hit.

Q. You state to the jury that you were not in the middle of the car jumping up and down giving a vigorous stop signal?

A. No sir. After I got on that end of the car I walked to the other end of the car to the brake and remained there until the accident happened.

Q. Which side did you get on from?

A. Over about the clearing post.

Q You got on the front end of the car?

A. On the end the ladder was on.

Q. It is always on the right hand side of the car as it moves, the ladder is.

A. Yes, sir.

Q. Always on the right hand side the way it is moving?

A. Yes, sir.

Q. That is you mean with your face the way the car is moving?

A. Yes, sir.

Q. And in front of you?

A. Yes, sir.

Q. The car moving this way east the ladder would be on the right hand side?

A. Yes, sir.

Q. Will be on the front?

90 A. Yes, sir.

Redirect examination:

Q. Are you sick, Mr. Lattin?

A. Yes, sir.

Q. Had there been any change in this train from the time it was made up here in the yard until it got to Sallisaw?

A. No, I do not know of anything.

Q. The cars were in the same position when you got to Sallisaw as they were here?

A. Yes, sir.

Q. One of these cars that you set out there was coupled to the car that had a link and pin coupler in it when you left Van Buren?

A. It was coupled in the west end of it. The car set out was between the automatic and common draw head——

—. —the car immediately in front of the car that had the common link and pin coupler when you left Van Buren was a loaded car and the one with the link and pin coupler in it, the one you rode back?

A. The rear end of the train had a caboose, the car behind that car was the car for Sallisaw, behind the link and pin coupler.

Q. This car behind this car here was the car you put out at sallisaw?

A. Yes, sir.

Q. Here would be your link and pin coupler?

A. Yes, sir.

Q. You took this car up over the siding and threw it out on the side track and let this car come back?

A. Yes, sir.

Q. What did this car have in it?

A. I do not remember.

Q. That is the way you found them when you got to Sallisaw?

A. Yes, sir.

Q. This car was loaded?

91 A. Yes, sir.

Q. Had its full capacity?

A. I do not remember.

Q. That is the way you got it from the yard master in the train?

A. Yes, sir.

Q. The ladder Mr. Miles asked you about is right opposite the end of the car, like this was the car would be the ladder here, a ladder here on the opposite end and opposite side?

A. Yes, sir.

Q. All cars are made that way?

A. Yes, sir.

Q. Would have a ladder at the front end of the car no matter which way it was moving?

A. Yes, sir.

Q. Mr. Lattin did you have any shim under this common link and pin draw head that evening?

A. I do not remember whether there was or not.

Q. Is that the link you speak of Taylor taking back there to put in?

A. I could not tell you.

Q. Is that they way it was put in the draw bar?

A. That is the way they go in the draw head.

Q. The link in there was brought to you by a brakeman?

A. Yes, sir.

Q. Who.

A. Brakeman Marshall.

Q. What did he do with it?

A. I do not know put it in the caboose I think, and gave it to Mr. Walsh.

Q. He has it now?

A. I suppose he has.

Q. Do you know when that link was out in there whether it was in the center of the draw bar or not?

92 A. You can see it is not quite in the center from that picture.

Q. Do you know whether that was in the center of the draft line or not?

A. I do not know.

Q. Do you know where the draft line is?

A. In the center of the draw head.

Q. What do you mean by the center of the draft line?

A. Each draw bar has a tail pin in it that runs back in the car.

Q. What do you mean by that draw head has a tail concern?
A. Front part has a hole all the way through.
Q. When you go back here where it is solid there is a tail pin runs back in there and fastens to the timber in the car.
Q. Fastens with a key between the draft timbers.
Q. What size draft timbers were these?
A. I do not remember standard I suppose.
Q. Do not know anything about the draft timbers under these cars.
A. No sir, I did not notice the draft timbers.
Q. Do you know whether this car that had the automatic coupler in it was taken from Sallisaw?
A. I think a couple of days afterwards I took it and carried it away.
Q. Do you know where it was repaired?
A. No, I cannot say.
Q. These box cars are constructed with white pine?
A. No not all of them.
Q. Yellow pine—all pine cars?
A. Frames of course.
Q. The upright pieces.
A. Pine sometimes made of soft wood.
Q. About half inch thick?
A. I think an inch thick.
93 Q. All very soft wood?
A. I think I have seen cars with strips of oak in it.
Q. Outside of it, the casing outside the car, upright pieces that makes the body of the car, it is all then soft wood.
A. Yes, generally.
Q. On the inside of the car it is boxed up two and a half or three feet.
A. Some are, and some are ceiled all the way.
Q. Do you know the condition of these cars?
A. No sir.
Q. Were they ceiled inside?
A. I do not know.
Q. Is not the end of the car the very weakest part of the whole structure?
A. I do not know about that, car men can tell you that.

Recross-examination:

Q. Mr. Lattin, do you know whether there was any difference in the height of the draft lines of these cars, or the center of the shanks of the draw bars of these cars, at the time they were originally constructed or not?
A. I do not.
Q. Do you know whether there was any difference between the centers of the draft lines or the centers of the draw bar shanks at the time these cars left Van Buren that evening or not?
A. I do not.
Q. You know of no difference at all in them at that time?

A. No sir.
Q. Where did you keep shims?
A. We had a supply in the caboose; they furnish them to us.
Q. What is the object in that?
A. To keep the draw heads raised up.
Q. To keep them of uniform and standard height?
94 A. Yes, sir.
Q. You were furnished a supply in the caboose?
A. Yes, sir.
Q. If you find a draw bar that has dropped down for any reason, while in transit, what is your duty?
A. Shim it up, put a shim under it and bring it up to standard height.
Q. What is it that will lower a draw bar?
A. Weak springs, wear of wheel, carrying iron drop down.
Q. Wearing of a brass will lower it.
A. Yes.
Q. Anything that will lower the floor of the car will lower the draw bar?
A. Yes, it is fastened to the bed of the car.
Q. All these things are constantly wearing some?
A. Yes, there is wear on every car, most every part of it.
Q. Whenever you find a draw bar sufficiently dropped down as to be out of uniform and standard height, the Company furnishes you these shims to put under there?
A. Yes, sir.
Q. Whose duty is it to put them under?
A. Brakeman's duty or Conductor's duty, whoever happens to notice it, we all work at it, when we find it that way it takes about three men to do it.
Q. How thick are these various shims?
A. From a half inch to an inch and a half, I think, and two inches, put two inch shims on it and make two inches out of it.
Q. So as to make the draw bars of proper height.
A. Yes, sir.
Q. Whose duty is it here in the yard and at Coffeyville to do that?
A. Car repairers.
95 Q. The car inspector?
A. Car inspector generally marks them, and the repairer fixes them.
Q. It is the car inspector's duty to make the discovery, and repairer's duty to fix them?
A. Yes, sir.
Q. How long does it take to put one of these shims under?
A. Sometimes you can put one under in a half minute, and sometimes it takes two or three minutes, owing to the condition of the car, if you don't have to cut the train to put them under.
Q. You sometimes have to open the automatic coupler and pull the cars apart?
A. Yes, and raise the draw head up, it takes two men to raise it up.

Q. Where do you get these shims on the caboose?
A. We draw them from the supply room—the store room..
Q. Draw these shims in the same way you draw links and pins.
A. Yes, sir.
Q. Or any other supplies so as to make current repairs going over the road?
A. Yes, sir.

Mr. CHEW:

Q. Do you know anything about the condition of the shanks of these cars?
A. No sir.
Q. Do you know anything about the springs on the trucks?
A. No I do not, they vary.
Q. Two at each end of the bolster?
A. Some cars have two, and some three I have seen a dozen.
Q. They are for the purpose of giving the car spring?
Q. Yes, sir.
Q. You did not know the condition of these springs?
96 A. No sir.
Q. Didn't examine the actual pressure?
A. No sir.
Q. Was the car inspected before it left?
A. Cars all are inspected before they leave.
Q. Do you know whether these cars were inspected?
A. I did not see them inspected.
Q. You cannot swear they were?
A. I could not.
Q. Who was inspector at that time?
A. I think Mr. McPherson was foreman.
Q. These shims are furnished there like links and pins?
A. Yes, or any other supplies.
Q. From the store room?
A. Yes, sir.
Q. Furnish them to you from an inch to two inches thick?
A. From a half inch to two inches thick.
Q. So if it got a half inch out of plum you would raise it up and put in a half inch shim and put it in line?
A. Yes, sir.
Q. Gets two inches out raise it and put in a two inch shim?
A. Yes sir, and put in an inch shim and a half inch and make it an inch and a half.
Q. Any shim under these draw heads?
A. I don't know.

Mr. MILES:

Q. These cars were made up and placed in the train in the yards here?
A. Yes, sir.
Q. And had proceeded about twenty-eight miles on the road?
A. Yes, sir.

Q. Find anything wrong with these cars prior to that time?
97 A. No sir, I do not think we had any trouble at all.
Q. Moved up the road all right?
A. Yes, we got along very nicely.
Q. Mr. Lattin, do you know of anything at all that was wrong with these cars prior to the accident up there?
A. No sir, I do not.

98 *Testimony Joe Curtis.*

JOE CURTIS, a witness for the plaintiff, being duly sworn testified as follows:

Q. Your name is Joe Curtis?
A. Yes, sir.
Q. Where do you live?
A. Van Buren.
Q. What position if any did you hold in Van Buren in January 1899?
A. Yard Master at Van Buren.
Q. Of the St. Louis, Iron Mountain and Southern Railway?
A. Yes, sir.
Q. Were you yard master at the time that the train went out on which George Taylor was killed?
A. Yes, sir.
Q. Did you see that train before it went out?
A. I made that train up myself.
Q. Do you know whether there was a car to be *be* set out at Sallisaw?
A. Two of them.
Q. What position were these two cars in that train?
A. One was the second or third car from the engine, and the other was about seven cars from the caboose.
Q. What kind of coupler did the seventh car from the caboose have?
A. Had automatic coupler then called a janey.
Q. What kind of car was this ahead of that car which was seven cars from the caboose, to be set out at Sallisaw just ahead of that?
A. What we called standard common old fashion coupler, iron coupler; what I mean a cast iron coupler; it was not an automatic draw bar.
Q. What kind of car was it just behind the car that was to be set out at Sallisaw?
99 A. Automatic.
Q. What was the character as to the height of the two cars the two automatic couplers, one that was to be set out at Sallisaw and one just behind that, how were those two couplers as to height?
A. The two automatic couplers were, I do not remember anything about how these couplers were, whether one was higher than the other.
Q. How was the car with the old common draw head just ahead of the car to be set out at Sallisaw with reference to the ordinary?

A. That car was too high we had to block it, and missed the coupling two or three times trying to get it together, this Sallisaw car and the car ahead of it.

Q. The car ahead of the Sallisaw car was too high?

A. Common draw bar was too high.

Q. How much higher than the ordinary draw head?

A. I should judge three inches probably; one or two probably four, but it was considerable higher.

Q. What was done, you said you had to make two or three attempts to couple it?

A. We made two or three attempts to get the train together.

Q. How would that car act against a link, or automatic or any other kind of coupler?

A. Would have to block the lower draw bar up.

Q. Would pass over the other?

Defendant objected.

Q. What would happen, if anything, when you attempted to couple this car which was just ahead of the car left at Sallisaw, to another car with an automatic coupler?

A. The draw head would have to be raised, or would have to have a long link.

Q. Could you or could you not take an ordinary link and raise it high enough to couple with this car I speak of ahead of the car left at Sallisaw?

100 A. I do not know how it would be if the Sallisaw car was set out, but in coupling the Sallisaw car to the train we made two or three attempts to get it coupled together on account of the common coupler was considerably higher than the automatic coupler, and very dangerous in those days to couple an automatic and a common; we either had to block it up on a level, or the link would turn sideways or run over the end.

Cross-examination:

Q. Mr. Curtice, where do you live?

A. In Van Buren.

Q. What business are you engaged in?

A. Saloon business.

Q. How long have you been in the saloon business?

A. Three years.

Q. Were you here when this case was tried three or four years ago?

A. I do not know whether I was or not; I think I was in South McAlester.

Q. You were in the Indian Territory?

A. I think so.

Q. You were not called as a witness then?

A. No sir.

Q. How did you come to remember so distinctly about how that train was made up?

A. Because it made a great impression on my mind after Taylor was killed, and because they demurred.

Q. Who demurred?
A. Lattin and the brakemen.
Q. What brakemen?
A. I think Taylor was break-ing in the middle and Witt behind, and I think Marshall was on the head end of the train, if I
101 remember right; I think that was Lattin's crew.
Q. Who demurred?
A. I do not remember exactly who.
Q. You stated they demurred?
A. Yes, all three.
Q. Who?
A. I do not know; they demurred on account of the way the train was made up—one Sallisaw car at the head end and the other at the hind end of the train, and they wanted to have the cars put together so they could switch them out with one switch, and I did not have time to put them together and they demurred about it; all were kicking.
Q. About the fact that the Sallisaw cars were not together in the train?
A. Yes, sir.
Q. Did not demur as to the condition of the cars?
A. No.
Q. You were in the Car Repairer Department one time?
A. No, sir, never was.
Q. Only switchman?
A. Switchman and yard master.
Q. What were your duties as switchman?
A. Put cars together as Yardmaster tells me.
Q. You stated you were Yardmaster?
A. At that time.
Q. You put these cars in the train?
A. I was right there and helped put up the train.
Q. Did you see anything wrong with it?
A. Nothing more than usual.
Q. Was anything wrong with these cars?
A. Nothing except the difference in the height of the draw bars.
102 Q. How much difference, the one in front and the one behind the Sallisaw car?
A. I do not know about the one behind the Sallisaw car, but the front end of the Sallisaw car and the car ahead of it, there was, I should judge, three inches difference; we had to block it.
Q. About three inches—you were entitled to that much?
A. I do not know.
Q. Don't you know what the rules were?
A. No, sir.
Q. Don't you know that you are entitled to three inches difference?

Plaintiff objected.
The COURT: I think that is a question of law.

Q. Who pronounced these cars road worthy?
A. Car repairer did it.
Q. You put them in the train?
A. Yes, sir; I helped do it.
Q. Did you make any measurements to see whether the Sallisaw car was unusually high or not?
A. Did not have time to make any measurements.
Q. Did you make any?
A. No, sir.
Q. Don't know whether it was unusually high or not?
A. No, I don't know anything about it.
Q. Can you tell the jury whether the west end was 29, 30, 31, 32, 33, or 34 inches above the top of the rail?
A. I do not know whether it was 50 or 60, I could not tell anything about that.
Q. Do you know how high the link and pin coupler was above the automatic one?
A. No, sir.
Q. You don't know whether it was 29, 30, 31, 32, 33, or 34 inches above the top of the rail?
103 A. No, sir.
Q. Could not tell anything about that?
A. I could not.
Q. You know the car bound for Sallisaw—you had trouble to couple it to this one?
A. Yes, sir.
Q. And don't know whether it was lower or higher than the standard?
A. No, sir; I don't know anything about it.
Q. How many trains did you make up that day?
A. I cannot tell you that. Cannot remember that far back.
Q. You say you remember this?
A. I did because it strongly impressed me when Taylor was killed and because they demurred.
Q. Not on account of the condition of the cars?
A. About the cars being so far apart in the train.
Q. You remember that?
A. Yes, sir.
Q. Do you know whether the coupler in the link and pin car was of the proper height under the Act of Congress?
A. I don't know anything about the Act of Congress; it was higher than a draw bar ought to be.
Q. You don't know whether it was between 31½ and 34½ inches from the top of the rail?
A. I don't know.
Q. You don't know whether the Sallisaw car was between 31½ and 34½, measured from the center of the draft line to the top of the rail?
A. I do not know.
Q. You don't know what is really meant by a uniform or standard height?

A. I don't know what they consider a standard height.

104 Q. All you know is that you had trouble coupling the car that was set out at Sallisaw with this link and pin car account of the difference between these two draw heads?

A. I know more than that; I know sometimes we find lots of draw bars——

Q. I am talking about this train. Do you know what the center of the draft line is?

A. No, sir.

Q. Do you know what the center of the draw bar shank is?

A. No, sir.

Q. You don't know what standard height is?

A. No, sir.

Q. You do not know what uniform height is?

A. I know what it ought to be.

Q. I mean in reality?

A. Ought to be the same height.

Q. Does not an uniform height have a variation of three inches?

A. Loaded or empty?

Q. I am not talking about loaded or empty?

A. There is a difference there.

Q. I am talking about a uniform height in railroading, is there not a variation of three inches allowed?

A. I don't know what they are allowed.

Q. How large is the shank of a draw bar?

A. What you call the stem?

Q. Yes, sir.

A. I don't know.

Q. How wide is the face of the draw bar, link and pin draw bar, of the Iron Mountain—Missouri Pacific System?

A. There is 100 different draw bars in the Iron Mountain System and different mouths on them.

Q. Do you swear that there are a hundred different ones?

105 A. I saw a whole lot of them.

Q. Don't you know the width of the link and pin couplers measured vertically was the same?

A. No.

Q. Don't you know a Missouri Pacific No. 2 is the same in vertical width?

A. No. 2 is.

Q. Can you tell what the width of a link and pin face vertically?

A. Four inches I think.

Q. I am talking about the face?

A. I do not know what the face would be. I should judge about eight inches.

Q. I asked you awhile ago about the face of the draw bars, I do not mean the opening of the slot, if the face of the draw bars of all the system link and pin coupler were not the same width, all of them?

A. No, sir.

Q. What is the difference?

A. From two to four inches difference.

Q. Were not all the system link and pin draw bars exactly nine inches vertical width across the face?

A. What is the number of these draw bars?

Q. I am talking about the link and pin couplers of the system?

A. They make three or four different numbers, the Iron Mountain and Missouri Pacific is entirely different.

Q. And was at that time?

A. Yes, at that time, and did not have standard draw bars.

Q. There are not any now?

A. I do not know sir, I have not been rail roading while standard draw bars—I quit rail roading on the Iron Mountain and Missouri Pacific.

106 Q. When did you quit?

A. I quit three years ago last September

Q. I asked you to state awhile ago if there was any difference?

A. I stated when I quit railroading—I don't know what they are now.

Q. Can you tell the jury whether there was any difference at all in the link and pin car which was in front of the Sallisaw car, and the car which was behind the Sallisaw car?

A. No, sir; I cannot do that.

Q. The west end may be different from the east end?

A. I do not know about that.

Q. What will lower a draw bar in a train?

A. Heavier load than the other would naturally sag the car down and the draw bar would drop.

Q. Suppose you have a very heavy load on one end of the car and none on the other?

A. I don't know about the ends.

Q. You say you are a railroad man, suppose you have a very heavy load in one end of the car and no load in the other?

A. Would have no bearing on the other end of the car.

Q. Don't you know one would go down and the other up?

A. I don't think it would have the same bearing all over.

Q. Don't you know every corner is supported by spiral springs?

A. Yes, sir.

Q. You tell the jury if you had a heavy load on only one end of the car it will mash down the springs in the other?

A. I don't know.

Q. Won't the wearing of the face of the wheel lower the draw bar?

A. Would not lower it three inches.

Q. I am not talking about three inches; won't the wearing on the wheel lower it?

A. I don't think it will because the spiral springs will lift

107 it up?

Q. Won't the wearing of the journal lower the draw bar?

A. Not to amount to anything.

Q. Won't it lower the draw bar?

A. I don't think so.

Q. Won't the wearing of the brass over the journal lower the draw bar?

A. I don't think so.

Q. Won't the wearing of the brass lower it?

A. I don't think it will.

Q. Won't the wearing of the carrying iron lower the draw bar?

A. Yes, sir.

Q. How much.

A. Depends on how much the wear is and how many loose bolts.

Q. Won't anything that lowers the floor of the car lower the draw bar?

A. There is only one thing I can see to lower a draw bar, that is to loosen the bolts, and let the carrying iron down and lower the draw bar. As long as the center plate is on here and the center pin in and spring in good condition, cannot lower the draw bar without loosening the bolts and lowering the carrying iron.

Q. You say the wearing of the wheel, the wearing of the brass, the wearing of the springs, and the wearing of the journal will not lower the draw bars?

A. I do not think it will I think the car will still carry its upright position.

Q. Would not the breaking of the springs do it?

A. I am not a car builder.

Q. You say you are a railroad man?

A. Yes, sir, I am not a car builder.

Q. Don't you know Mr. Curtis, that if you set a low pair of wheels under a car, the floor will be lower than if you had a higher pair of wheels under it?

108 A. You can set just as low or high a pair of wheels under a car as you want to.

Q. If you put a low pair of wheels under a car, and have the same kind of springs on it, won't that lower the draw bar?

A. Yes, sir.

Q. Then why don't the wearing of the face of the wheels lower it?

A. There is not wear enough on any wheel to wear it off the sixteenth of an inch.

Q. That would be the sixteenth of an inch?

A. It might do that.

Q. How thick is the brass over the journal?

A. I don't know.

Q. Would not a new brass hold the floor of the car higher up than a half of a brass?

A. Would not make a particle of difference.

Q. Would a weak set of springs hold a car up as well as a set of strong ones?

A. It would depend on whether the car was empty or loaded. If loaded it won't, if empty it will.

Mr. CHEW:

Q. Speaking about the brass Mr. Miles asked you about they have some babbett metal in them?

A. The majority used on box cars have.

Q. You tell the jury that babbett metal worn out and the brass worn out would have no effect on the height of the draw bars?

A. Because the spring makes the adjustment there.

Q. The brass has nothing in the world to do with the support of the body of the car?

A. None whatever.

Q. Do you know what the life of a journal is?

A. No, sir, I do not.

109 Q. Know what the life of the face of the wheel is?

A. I have heard that discussed, but I could not give you any opinion now at all.

Q. Do you know how much wear of a car wheel would take place in a run of an hour and a half of 28 miles? would it be appreciable?

A. Would not be anything at all, would not be any in thirty days.

Mr. MILES:

Q. Suppose it was run continuously for four or five years, would there not be some wear on it; do you think if these cars had been run continuously for four or five years it would make any difference?

A. I don't know anything about that, sir.

Q. Do you think it would make any difference?

A. I don't know anything at all about it.

110 *Testimony Berkeley Neal.*

BERKELEY NEAL, a witness for the plaintiff, being duly sworn testified as follows:

Q. Berkeley Neal is your name?

A. Yes, sir.

Q. You are a member of the bar here.

A. Yes, sir.

Q. What relation were you to George Taylor?

A. He was the husband of my niece.

Q. Did you know George Taylor?

A. Yes, sir.

Q. How long?

A. Ever since he was a baby.

Q. Twenty-four or twenty-five years.

A. I don't know how old he was somewhere about that.

Q. About his place much during his life time?

A. Frequently, several times.

Q. What was the character and condition of Mr. Taylor's life during the last year or two of his life, his health?

A. I think it was good.

Q. What manner of man was he as to morals?

A. He was a very correct man; no bad habits.

Q. What manner of man was he as to energy?

A. Very energetic.

Q. What was his conduct towards his children, if you were ever

present with his family, manner of treatment towards his children?

A. He thought a great deal of his children frequently had them around with him in town.

111 *Testimony Jonathan Neal.*

JONATHAN NEAL, a witness for the plaintiff, being duly sworn testified as follows:

Mr. CHEW: We offer to prove by this witness the same thing in substance as testified to by Berkeley Neal.

Mr. MILES: We will admit that he will testify in substance to what Berkeley Neal testified to.

Mr. CHEW:

Q. Your name is Jonathan Neal?

A. Yes, sir.

Q. How old are you?

A. Sixty-five years old.

Q. Where have you spent your life?

A. Here mostly in Crawford County.

Q. Did you ever handle any money or property for George Taylor during his life.

A. For seven years before July, 1897, he kept his cash with me.

Q. What do you mean by keeping his cash with you; do you mean turned it over to you?

A. Yes for seven years he continuously brought his checks to me, and whatever money he received—what he said he received, and placed it in my hands and checked out on orders to pay debts and grocery bills.

Q. About how much per month would he turn over to you?

A. I could not tell you when he first went into the railroad business not much; did not make much, the last year if I remember, he turned over to me an average of eighty-six dollars per month.

Q. The last twelve months?

A. The last twelve months that he kept a cash account with me.

Q. Two years before his death?

A. Yes, sir.

112 Q. Average of how much?

A. Eighty-six dollars per month, the last year he kept his cash with me.

Q. Had he accumulated any property?

A. Yes, a home and paid for it.

Q. About how much was that home worth do you know?

A. Twelve or fifteen hundred dollars, probably fifteen hundred.

Q. Had he accumulated anything inside the house?

A. Yes, well furnished.

Q. What was the accumulation inside the house, in the way of furniture?

A. Household furniture beds and bedding.

Q. I mean to ask about the value of it?

A. Never thought much about that, 100 or 200 or 300 dollars, well furnished.

Q. I will ask you to state how he provided for his children and wife, if you observed?

A. I think the best the market afforded.

Q. What were his habits as to spending money on himself; was he extravagant on himself?

A. I don't think he was, he dressed plainly and had no evil habits; had no spending habits.

Q. Can you tell now about how much of his earnings when he kept them with you that he spent for his own personal expenses?

A. I could not tell you that.

Q. Know about what he spent on his wife and children?

A. I know this, that during the time that I kept his money he paid out a debt of something over $500 and when he closed the account with me there was $200 left.

Testimony of Mrs. Dickson.

It was agreed that Mrs. Dickson would testify in substance the same as Berkeley Neal.

113 *Testimony of Mrs. George Taylor.*

Mrs. GEORGE TAYLOR, a witness for the plaintiff, being duly sworn, testified as follows:

Q. What is your given name?
A. May.
Q. Your husband was the son of Capt. W. L. Taylor here?
A. Yes sir.
Q. How old a lady are you Mrs. Taylor?
A. Thirty two.
Q. Which was the older, yourself or your husband?
A. I was six months older.
Q. He was twenty six years of age at the time of his death?
A. Yes sir.
Q. You were in your twenty-seventh year at the time of his death?
A. Yes sir.
Q. What is the condition of your health now?
A. My health is not at all good.
Q. You have no disease of any kind?
A. No, not very.
Q. What was the condition of Mr. Taylor's health?
A. His health was splendid.
Q. How old is your eldest child?
A. Thirteen.
Q. What is his name?
A. Neal.
Q. How old is the next one?

A. Eleven.
Q. How old is the next?
A. Four.
Q. That child was born subsequent to the death of your husband?
A. Yes sir.
Q. How long after the death of your husband?
114 A. Six or seven months.
Q. About how much money, Mrs. Taylor, was your hu
band expending on yourself and family, independent of his ow
expenses, at the time of his death, per month or per year?
A. I don't know our expenses put it in together, his with the re
I imagine about forty or fifty dollars per month. That was all o
personal expenses, grocery bills and everything; the rest he used
the place—in paying for the place. His place was paid for, he p
the rest away.
Q. What was he earning per month at the time of his death?
A. On the average of eighty five dollars per month. I guess
did make as much as $125 per month.
Q. About an average of $85. per month.
A. Yes sir.
Q. What did he do if anything towards training his two childre
A. He was always helping them in their studies and in th
Sunday School work.
Q. When he was in town I will ask if he would loiter around t
street or was he at home with his family?
A. Always at home.
Q. About what was the value of the household goods of your hu
band at the time of his death?
A. I don't know what it would be valued at.
Q. Give an estimate of its value?
A. I suppose three hundred and fifty dollars, something like th
Q. Do you know what the home was worth?
A. About 12 or 15 hundred dollars.
Q. Had accumulated that in addition to his expenses?
A. Yes sir.
Q. Is this your little son here?
A. Yes sir.
Q. His name is Neal?
A. Yes sir.
115 Q. Was that your little daughter here in the court roo
this evening?
A. Yes sir.
Q. You say he assisted the two children that were living at th
time in their Sunday school lessons.
A. Yes sir.
Q. Did he assist them in directing their physical developme
exercises of any kind?
A. No, not very much?
Q. Did he any?
A. Yes some.

Q. State if he took any pains towards developing their minds, and teaching them the ordinary things children were capable of receiving at their ages?

A. Yes sir.

Q. What.

A. He heard them their lessons, and in all things of that kind; and was very anxious to give them a very good education.

116 *American Mortality Table Introduced.*

Here the American mortality table was introduced, which showed that a man at the age of 26 years would have a life expectancy of 38, 1 years.

At 27 years of age expectancy would be 37.4 years.

32 years of age, expectancy would be 33.9 years.

Here the plaintiff rested his case.

Deft Moved for Verdict.

Thereupon the defendant moved the court to direct the jury to return a verdict in favor of the defendant on the ground that the testimony offered on behalf of the plaintiff taken in its strongest probative sense against the defendant and most favorable to the plaintiff was not sufficient to support a verdict against the defendant.

Motion Overruled.

The court overruled the motion of the defendant, and the defendant saved its exceptions.

Testimony of Defendant.

The defendant to maintain the issues upon its part introduced the following testimony to wit:

Testimony B. M. James.

B. M. JAMES, a witness for the defendant, being duly sworn testified as follows:

Q. Where do you reside?

A. Sallisaw, Indian Territory.

Q. How long have you been residing there?

A. About 11 years except about eleven months away.

Q. What business are you engaged in ?

A. Livery business and first one thing and then another.

Q. Were you in Sallisaw on the day George Taylor was killed?

A. Yes sir.

Q. Where were you at the time the accident happened?

117 A. Standing in Winsett's livery stable door.

Q. How far was that from the point where the accident happened?

A. Something like two hundred feet.

Q. In what direction?

A. A little bit northwest I should think.

Q. On which side of the railroad track?

A. South side.

Q. Little bit northwest of where you were?

A. Yes sir.

Q. In other words you were on the left hand side of the railroad track going towards Coffeyville?

A. Yes, sir.

Q. About two hundred feet away?

A. Something near that.

Q. Did you see Mr. Taylor when he was hit?

A. Yes, sir.

Q. Commence Mr. James and tell the jury exactly what you saw in your own way?

A. I was killing hogs for Winsett right back of the barn, got done putting the hogs in and turned to leave, just got the work done and making to the door—the two lower doors was shut, and I was standing this way (indicating arms on top of lower door).

Q. Double doors above and below?

A. Yes, sir.

Q. On top of the bottom doors?

A. Yes sir, the train was almost right in front of me, and a little bit to my left-right in front of me, and I noticed its "chucking."

Q. Exhaust of the engine?

A. Yes sir, that attracted my attention, and seen this man make his way fixing to make the coupling, and was standing on what I call the brake rod hanging on the end.

Q. Of what car?

118 A. The coming car.

Q. Riding that car?

A. Yes sir, riding that car, there was a man on top, I did not pay much attention to the man on top, was watching this man that was going to try to make the coupling, I thought that was what he was going to do or try to do. When he got in thirty or forty feet I suppose he jumped in with the link and pin in his hand, and I just says to myself——

Plaintiff objected.

The COURT: I do not believe he can state that.

Mr. MILES: I offer to show that this party at that time said that he started in there he would be killed, from what he saw at that time, I offer that a part of the *res gestae*.

The court refused to allow the plaintiff to introduce this testimony, and to the action of the court in that regard, the defendant saved its exceptions.

The WITNESS: He had the link and pin in his hand, and went to put it in the coupling.

Q. What coupler?

A. In the standing car, and then went to make his escape, and did not have time to raise his link up.

Q. Did he raise the link up at all?

A. No sir.

Q. Just as soon as he got the link and pin in the standing car started to jump out?

A. Yes, sir.

Q. Did he get out?

A. No sir, I could see his feet and when the cars struck coming together that hid him from me.

Q. Did you go over there right away?

A. Right straight away.

Q. Did you notice anything wrong with the cars after they
119 came together?

A. One of the drawheads was broken out and saw one off the track; but which one was off the track, and which one was broken the draw head was broken off I could not say.

Q. You did not notice the man on top of the car?

A. I seen him but did not know what he was doing.

Q. Watching the other man all the time?

A. Yes, sir.

Q. As he jumped did you notice how fast the cars were coming?

A. Coming at pretty good speed I thought.

Q. Did Taylor seem to be running fast doing his best?

A. I think he was running his best, it looked to me like he was *he was* running a pretty good hickory.

Q. Did you notice how far back up the track it knocked the standing cut of cars?

A. Some little distance, a good piece, near the length of the standing cars.

Q. About the length of the cut of cars.

A. Yes, sir.

Cross-examination:

Q. Are you a livery man?

A. No sir.

Q. What are you doing now?

A. Driving a dray team.

Q. What have you been doing since then?

A. Working in a gin and mill and farming.

Q. Ever railroad any?

A. Never.

Q. Where are you from?

A. Franklin County, Arkansas.

Q. Where abouts?

A. Near Ozark, ten miles north of Ozark.

Q. How long have you been up there?
120 A. About 11 years.

Q. Up at Sallisaw Indian Territory?

A. Yes, except eleven months.

Q. If I understood you correctly, you were in the livery stable on the left hand side of the track as you go west?

A. Yes sir.

Q. That is, you were on the business side.

A. On the side town is on.

Q. You were about 150 feet.

A. Something about 200 feet I never measured it.

Q. Something about 200 feet?

A. Yes sir.

Q. A little west of north of where the accident occurred?

A. Yes sir.

Q. He was a little north of west from you?

A. Yes sir.

Q. You were southeast from him?

A. Yes sir little angling.

Q. Who was with you?

A. No one.

Q. Nobody at all?

A. Ed Johnson was back in the barn.

Q. Do you know where Hynes bank is?

A. Yes sir.

Q. How far is it from the depot over to that bank?

A. About three or four hundred feet?

Q. The bank is right on the corner of the street that runs north and south?

A. Yes sir.

Q. There is a street then that runs at right angles over the railroad right down by the avenue right south of the railroad on down
121 by that bank—you know where the furniture house is?

A. Yes sir.

Q. That street runs at right angles with the railroad?

A. Runs right square across the railroad.

Q. You tell the jury from the railroad over to the bank is about 300 feet?

A. Cross ways.

Q. That bank is just a little east of where the depot is?

A. Yes sir.

Q. Do you know where Mr. Francis store is?

A. Yes sir.

Q. That is right opposite the depot right south.

A. Little bit to the left of the station at the depot.

Q. How many feet?

A. Thirty or forty feet.

Q. To the left?

A. Yes sir.

Q. Coming back east would bring you up to the corner of where the bank is?

A. Yes sir.

Q. Where is the livery stable as to these points?

A. West of them.

Q. In that same block?
A. No, not in the same block, another street.
Q. Another street runs north and south just across the track?
A. Yes sir.
Q. You tell the jury that Francis store is a little east to the left of the depot about thirty or forty feet?
A. Yes sir.
Q. Then you were about half way the block across the next street going west, in the livery stable.
A. Yes sir.

122 Q. Looking back down towards—that is, to look from where you were to the depot, what direction would you look?
A. To my right to the depot.
Q. That would make you look northeast?
A. Yes sir.
Q. In looking from where you were north east towards the depot, how far is it to the depot?
A. Something like three hundred or four hundred feet.
Q. From the depot up to the switch stand at the west end of the side track, how far would you say it was?
A. I could not tell you, it is moved now.
Q. About what was it then?
A. I could not say, because I do not remember; I do not remember where it was.
Q. Don't you remember where the switch stand was at the west end of the side track?
A. No because it is moved now.
Q. Which way did they move it?
A. Put in another track; moved it last summer.
Q. How many switch stands west of the depot at the time of the killing?
A. One.
Q. How far was that from the west end of the depot?
A. I suppose it might have been 150 feet, might have been farther.
Q. From the west end of the depot to the switch stand at the west end of the side track was about 150 feet?
A. It might be.
Q. From where you were how far was it to the switch stand?
A. I could not say.
Q. 150 feet west of the depot to the switch stand?
A. I was guessing at that.
Q. It was your judgment as to where you were what distance it was?

123 A. Yes sir.
Q. Was there any cars on the side track?
A. There was one or two.
Q. Where were they?
A. I could not say.
Q. You could not?
A. No sir.

Q. Which end of the side track were they on—the west end or east end?
A. West end.
Q. How far from the switch stand?
A. I could not say that either.
Q. About how far?
A. It was something in the clear.
Q. Do you know what a clearing post is?
A. I know what they are.
Q. How far was clearing post from the switch stand?
A. I could not answer that question, to give a proper answer.
Q. Where was this car when Taylor got on it?
A. I do not know where it was.
Q. Where was it when you saw him?
A. He was riding it.
Q. Where was he?
A. Coming down on the main line.
Q. Which side of the side track?
A. He was back in between the switch track and the car that was standing still.
Q. Would that put him east or west of the side track?
A. East.
Q. How far east?
A. I could not say.
Q. Tell the jury how he acted when he got this truck to ride? What he caught hold of?
124 A. I do not know what he caught hold of and I do not know how he acted when he got on.
Q. How was he acting when you saw him?
A. Holding on this end.
Q. On the side of the car?
A. Hand on the grab iron and feet on the truck rod.
Q. I thought the brake rod runs laterally with the car?
A. Yes sir.
Q. There was nothing in the way for you to see all this?
A. Nothing in the world.
Q. I want to understand you say this book was the car, was he on the side of the car or the end of the car?
A. On the end of the car.
Q. You speak of the end of the car what you call the brake rod?
A. The truck beam.
Q. The big piece of wood that carries the iron shoes or brakes of the cars?
A. Yes sir.
Q. Tell the jury how far east of this switch stand he was when you first saw him?
A. I could not, because I don't know.
Q. Which way were you looking when you first saw him, east or west from the stable?
A. I was looking north west.
Q. Chucking of the engine was what made you look?

A. Yes sir.
Q. Was the engine attached to the cars when you saw him?
A. No sir.
Q. Cut entirely loose?
A. Yes sir.
Q. Where was the engine?
A. I do not know where it was, but I don't think it was on the main line; it might have been on the main line, but there
125 you have me where I can't answer.
Q. May have been on the side track?
A. Might have been.
Q. Where was this man you saw on top of the car?
A. Coming back to the standing car.
Q. What car was it the man got on top of?
A. Car that ran together.
Q. That Taylor was on?
A. Yes sir.
Q. How many cars in this string of cars you saw?
A. I could not say; I don't believe but the one on this cut coming.
Q. Is that your best recollection about the number of cars in that cut?
A. Yes sir.
Q. Which side of the track was Taylor on when he was killed?
A. He was on the right hand side—north side.
Q. And clear across right opposite the side of the track from where you were?
A. Yes sir.
Q. You tell the jury he was on the opposite side of the car, that is he was killed on the opposite side of the car from where you were?
A. Yes sir.
Q. When the cars came together, what direction was your face looking?
A. Straight at him as I could.
Q. Right straight across?
A. No, a little bit angling.
Q. What direction?
A. Little northwest.
Q. You think just one car in that cut?
A. I think so, will not be positive.
Q. What rate of speed were the cars travelling when Taylor got on the cars?
126 A. I could not tell because I did not see him get on.
Q. Had he passed the clearing post when you saw him?
A. I do not remember; never paid any attention.
Q. You were standing in the livery door with you- hands in this position?
A. Yes sir.
Q. On top of the second or botton door?
A. On top of the bottom door; top door was open.
Q. What day of the month was it?
A. I could not tell you.

Q. What year?
A. Could not tell you that; never thought anything about it.
Q. Was it a week day.
A. Could not tell you that.
Q. You say you saw him get down off the car and take the link out of it?
A. I don't know whether he taken the link out of it or not.
Q. What did he do?
Q. Got down off the car, had the link and pin in his hand, don't know now whether he taken it out of the coming car or not.
Q. Where was he when you saw him with the link and pin in his hand?
A. He ran about half the distance and had the link in one hand and the pin in the other.
Q. Which hand did he have the link in?
A. I could not say that.
Q. Which way was his face when you noticed him?
A. Coming right due east.
Q. Running at a mighty good hickory?
A. Yes sir.
Q. How far was the coming car from the standing car down at the depot?
A. I don't understand that question.
127 Q. How far was the car that you call the coming car from the standing car on the main line down to the depot at the time you saw Taylor get off and start to run ahead of the cars—how far apart were they?
A. Looked to me like thirty or forty feet.
Q. You tell the jury he was running a pretty good hickory but did not gain on the cars?
A. No sir.
Q. Was the cars gaining on him?
A. No.
Q. Which car was the man on top?
A. I could not say because I was watching this man that got killed.
Q. When Taylor went down to the standing car what did he do?
A. He put the link and pin in and went to make his escape.
Q. How close was the cut of cars to him then?
A. Right at him.
Q. Which way did he undertake to escape?
A. He turned away quick I could not tell.
Q. One of the cars was off the track?
A. Yes sir.
Q. Which car was it?
A. Must have been the coming car.
Q. Which car did you see?
A. Coming car.
Q. Did it get over the rails?
A. One truck did.
Q. One truck did, one wheel.

A. One set of wheels.
Q. Which wheels?
A. Front wheels.
Q. Which side of the track did this wheel get off?
A. On the left hand side.
Q. On the side next to you?
128 A. Yes sir.
Q. How far did they run on the ties?
A. About the length of a car.
Q. And then where was the right hand wheel?
A. It was inside the track.
Q. Nearest which rail?
A. It was nearest to the right hand rail.
Q. Where was the caboose standing?
A. Right about the depot?
Q. Something right in front of the depot?
A. Something like that.
Q. Where was the west car of the six cars standing as to the depot?
A. West of the depot.
Q. How far?
A. About the length of these standing cars; I don't know how many in the string standing.
Q. You know the little road crossing there at the end of the depot?
A. Yes sir.
Q. How far from that?
A. West of that something like about two or three cars.
Q. West of the six cars just west of the depot?
A. Yes, crossing just east of the depot was cut.
Q. How far was this crossing just east of the depot?
A. I don't know.
Q. A car's length?
A. More than that.
Q. Three car lengths?
A. Four or five maybe six.
Q. It was cut?
A. It was open.
Q. How was the crossing at the west end of the depot, was it blocked by these cars standing there?
A. Yes sir.
129 Q. How many cars west of that little crossing?
A. I could not say.
Q. Did you see the link and pin afterwards?
A. I seen the link.
Q. Where?
A. In the standing car.
Q. Did you examine it?
A. Yes, looked at it.
Q. How did it appear to you?
A. Cut considerable.
Q. What do you mean by being cut?
A. The other draw head climbed up it.

Q. In climbing up it, what effect did that have on top of the link?
A. Cut it a whole lot.
Q. Make it bright?
A. That is what I call cut it.
Q. What effect did it have on the draw bar of the standing car?
A. I do not know broke one all to pieces.
Q. Broke the one in the coming car?
A. I could not say which one.
Q. Which car had the automatic coupler?
A. I think the standing car.
A. Then the moving car had the common draw bar in it?
A. Yes, if I saw right.
Q. As you recollect it now, the moving car had the common link and pin coupler?
A. Yes sir.
Q. Link and pin draw head was broken.
A. Yes sir.
Q. And this link you speak of was there in the automatic coupler, in the draw head of the standing car, and you say it was cut until it looked bright.
130 A. Yes sir.
Q. Any evidence of any cut on top of this draw head?
A. Not that I remember.
Q. Do you know what became of the link?
A. No sir.
Q. Any break in this drawhead?
A. Not that I remember.

131 *Testimony — Ed Johnson.*

Ed Johnson a witness for the defendant being duly sworn testified as follows:

Q. Where do you live?
A. At Sallisaw.
Q. How long have you lived there?
A. About six years.
Q. Were you at Sallisaw on the day that Mr. George Taylor was killed?
A. Yes sir.
Q. Where were you that evening?
A. Right in the stable door.
Q. What stable?
A. Stable at Bill Winsetts.
Q. Just tell the jury what you saw there in your own way?
A. I was standing in the stable door, door was pretty near out on the right of way of the railroad, right in front of the railroad track, like that is the railroad over here is the livery stable. Over half of the train was standing on the main line, and set out two boxes on this switch, and they went on up and coming on back to make coupling—made a coupling on the main line, and this man had a link and pin in his hand, and the car that he was on that was next

to the—just about a length from the car, and was next to the engine on the west end. The car was coming down pretty fast, and just about like here was this car, right here is the car he was on, and when he jumped off and ran here about the length of another car, which would make two, and ran pretty fast, and ran right in there to make this coupling. Cars come together and I think the draw bar or something broke, and ditched the car on the east end. The car on the main line on the east end standing still, and on the west end it ditched that car.

Q. On the east end of the west car?

A. Yes sir.

Q. How far were you away from him?

132 A. Like here was the right of way about ten steps to the streets that is where the stable was just in front of the streets.

Q. The stable fronted right towards the track?

A. Yes, an old seed house stood there, and the cars had run down past the old seed house.

Q. Who was standing there close to you?

A. Mr. James.

Q. Did you see a man on top of the cars?

A. I saw a man on top of the cars, but was near the engine on the west end.

Q. Was anybody on top of the cars giving signals to the engineer?

A. I did not pay any attention to him giving signals. I was looking at the man on the ground.

Mr. MILES: I offer to make the same showing by this witness that when this party was running in there and these cars coming together he said "look at that man, if he goes in there he will be killed."

Plaintiff objected.

Objection sustained by the court.

Defendant saved its exceptions.

Cross-examination:

Q. Your name is Ed Johnson?

A. Yes sir.

Q. What do you do at Sallisaw?

A. In the livery stable business.

Q. How long have you been in that business.

A. Pretty near seven years.

Q. Mr. James was standing in the barn door with you?

A. He was not with me; he was on the outside; he was working at the stable at the same time.

Q. He was clear outside the stable.

A. He was outside the stable.

133 Q. There are four doors to the barn?

A. Yes sir.

Q. Cut right in two, in the middle so you can close the lower doors?

A. Yes sir.

Q. Wasn't James standing inside the barn with his hands on top of these doors looking that direction?
A. Not as I remember. My recollection is that he was on the outside.
Q. How far on the outside?
A. Not a great ways from the stable.
Q. Were the lower doors closed?
A. Lower door was open, the whole four doors was entirely open.
Q. No doors closed at all?
A. No sir.
Q. How many cars were in the cut you saw coming down that Taylor was riding?
A. I did not pay any attention.
Q. More than one?
A. The car he was on coming down the main line?
Q. How many cars attached to the car he was on?
A. I could not tell how many.
Q. More than one?
A. Yes more than one.
Q. Could you give any idea?
A. Seems to me he had about three or four cars dropped off two.
Q. Where was the engine?
A. Engine was on the west end.
Q. Attached to them?
A. Yes sir.
Q. Did the engine make much noise?
A. Did not seem to me to make much noise?
Q. Make that exhaust noise?
A. I did not pay much attention to the engine I was look-
134 ing at the man.
Q. How many cars standing down there by the depot?
A. I could not tell over half of the train on the main line.
Q. How many.
A. I could not tell you.
Q. Ten?
A. I do not know, sir.
Q. Six?
A. More than that because it was a long train.
Q. Which side of the track did Taylor fall on?
A. South side.
Q. Fall on the left hand side going west?
A. Fell on the right hand side going west.
Q. Which side did he fall on going west?
A. That made it the north side.
Q. On the side next to town?
Q. Like here is the town—on the south side.
Q. Your livery stable was up here on the left hand side going towards Coffeyville?
A. Yes, sir.
Q. The man fell on which side?
A. The man fell on the other side from me.

Q. What is the name of the man running the livery stable?
A. Paul Winsett.
Q. This man James was working for him?
A. Yes, sir.
Q. Had Mr. James been killing hogs that day?
A. Not as I know of.

135 S. C. RAWSON, a witness for the defendant was called.

Mr. MILES: We offer to show by Mr. Rawson the same thing in substance that we offered to show by witnesses James and Johnson, and made the expression that "if that man went in there he would be killed."

Plaintiff objected to statement of expression.

Objection sustained by the court.

Defendant saved its exceptions.

Mr. MILES: We might as well dispose of the other witnesses on that point. I offer to show the same thing by Charlie Fry and W. D. Alford who was standing 75 feet away. Fry said that he saw those cars coming down and that he remarked "those cars are going to hit like hell, and if that fellow goes in there he will be killed." Mr. Alford said that if he ran in there he would get killed.

Plaintiff objected.

Objections sustained.

Defendant saved its exceptions.

136 *Testimony — W. D. Alford.*

W. D. ALFORD, a witness for the defendant, being duly sworn, testified as follows:

Q. Where do you live?
A. Sallisaw.
Q. How long have you lived there?
A. Fourteen years.
Q. Where were you at the time of the occurrence of this accident?
A. On the west end of the platform.
Q. About how far from the point where the cars came together?
A. About fifty or seventy-five feet.
Q. Did you see Taylor before he was killed?
A. Yes, sir.
Q. Commence and tell the jury in your own way what you observed?
A. I was sitting on the trucks, suppose they had a couple of cars to set out, had set one out. Went out and switched a cut of ten or eleven cars on the main line off the engine, and he started in to make the coupling, in the meantime riding these cars down.
Q. Where was he on the car?
A. On the front end of the head car.
Q. Which side?
A. South side.
Q. How close down?

A. Thirty or forty feet. He started to make the coupling, after he got in there I was right opposite. I could not see him after he got in there to make the coupling; when they hit I saw him fall.

Q. Did you see conductor Lattin?

A. Yes, sir.

Q. Where was he?

A. Up on top; I could not tell exactly what he was at; when he fell I was looking east.

137 Q. Did you notice what Lattin was doing?

A. Giving a stop signal.

Q. Show the jury what kind of a signal? (Here witness makes stop signal to the jury.)

Q. When the cars struck, you saw Taylor fall down?

A. Yes, sir.

Q. How many cars were standing on the main line when he dropped?

A. I could not say.

Q. About how many?

A. Five or six cars.

Q. How far back up the main track did it knock these six?

A. I could not tell; all I know they were rolling, and I went on down where he was; did not pay any attention.

Q. Knocked them back though?

A. Yes, sir.

Q. After Taylor went in the first thing you saw of him after the cars struck and he fell down?

A. Yes, sir; I was right up opposite these cars on the main line and the end of the car shut him off.

Q. Have you ever had any experience as a trainman?

A. Yes, sir.

Q. How long?

A. Seven months.

Q. What would be your opinion, Mr. Alford, as to the speed of those cars when they struck?

A. I could not say exactly; about eight miles per hour.

Q. Which way was Lattin the man giving the signals facing?

A. I did not notice which way he was facing?

Q. How many stop signals did he give?

A. Two or three.

Q. Was he on the running board or side of the car?

A. On top of the car.

138 Q. I mean on the side of the car or running board?

A. I could not say.

Cross-examination:

Q. Which car was Lattin on?

A. I could not say, on a box car.

Q. Which end of the car was he on?

A. I could not tell that either.

Q. What business are you in up there now?

A. Working in a store.

Q. Who for?
A. Shermer.
Q. How far east from where you were up to this man Winsett's livery stable?
A. Right across the track a couple of hundred feet.
Q. Where was the engine at this time?
A. Just about west of the switch.
Q. Coupled onto this string of cars?
A. No, sir.
Q. How far east of this string of cars was the engine?
A. I could not say how far.
Q. Was it on the main line or the side track?
A. Main line, had not got back in the passing track yet?
Q. Was the engine east or west of the switch stand?
A. West.
Q. How far west?
A. I could not say.
Q. How many cars attached to the engine up there?
A. Three or four, maybe not more than two.
Q. Give the signal that Lattin was giving?
A. Stop signal; just wave both hands.
Q. On top of the car?
A. Yes, sir.
139 Q. Who was he giving that signal to?
A. I suppose the engineer.
Q. Engineer was in the engine?
A. Yes, sir.
Q. And it was west of the switch stand?
A. Yes, sir.
Q. What space was there between the cars attached to the engine and the cars Mr. Lattin was on?
A. I could not say; maybe three or four cars.
Q. No way for the engineer to control the speed of these cars?
A. No, sir.
Q. You do not know what Lattin was giving those signals for?
A. No, sir.
Q. Don't know whether he was giving the signals to stop him or keep him from going in the side track?
A. I do not know.
Q. Any body on top of the cars except Lattin?
A. No, sir.
Q. You cannot locate Lattin?
A. No, sir.
Q. Did you examine the draw head after the killing?
A. Yes, sir.
Q. Which one did you examine?
A. Both.
Q. You examined the draw head in the west end of the car that was standing still?
A. Yes, sir; I noticed it is all.
Q. Did you notice the link in it?

A. Yes, sir.
Q. How did it appear?
A. I supposed the draw head run up on the link.
Q. Draw head run up on the link?
A. Yes.

140 Q. Suppose this book was the link, the draw head went up on the link?
A. Yes, sir.
Q. That was the draw bar of the automatic coupler?
A. Yes, sir.
Q. Did you notice then the top of the automatic coupler?
A. No, sir.
Q. Did you notice whether anything was broken or not?
A. I did not notice.
Q. The draw head of the car going east that was broken off entirely?
A. I could not tell.
Q. Know what became of the link?
A. No, sir.
Q. How many of these cars got off the track there?
A. One pair of trucks.
Q. Did the entire trucks get off, or just one set of wheels?
A. The whole truck got off.
Q. Which side of the track did the trucks leave the rails, north or south side?
A. South side.
Q. The south wheels of the trucks left the track?
A. East wheels.
Q. Trucks under the east end of the moving car went off the track?
A. Yes, sir.
Q. The trucks on the south side?
A. Wheels went off on both sides.
Q. Wheels on the south side and the wheels on the north side on the east end of the car went off the track?
A. Yes, sir.
Q. Trucks on the west end of the car did not get off?
—. No, sir.

141 Q. If we take this red line on the carpet to be the south rail, that one to be the north rail, please state whether the entire truck, that is all the wheels on the truck, came south of the south rail?
A. The entire trucks came over. The front trucks, east trucks.
Q. The wheels on the north end of the trucks remained between the rails?
A. Yes, sir.
Q. Wheels on the south end of the trucks came over the track?
A. Yes, sir.
Q. Which one of these rails were the wheels of the north end of the trucks nearest, north rail or the south rail?
A. North rail, I guess.

Q. Nearest the north rail?
A. Yes, sir.
Q. How far did the car run after it left the track?
A. I never paid any attention.
Q. You said that at the time the cars came together you could
t see Taylor and did not know what he was doing?
A. No, sir.
Q. Did you hear Lattin say anything at the time?
A. No, sir.
Q. You have had seven months experience, and they were run-
ng in your judgment at the time the train came together eight
iles per hour?
A. Somewhere along about there; could not say exactly.
Q. How far from where you were to the switch stand at the west
d of the side track?
A. About 150 or 200 years.
Q. Up grade from the switch back towards you?
A. Yes, sir.

12 *Testimony of Charlie Fry.*

CHARLIE FRY, a witness for the defendant, being duly sworn,
stified as follows:

Q. Where do you live?
A. Sallisaw.
Q. How long have you lived there?
A. I was raised in six miles of there.
Q. What business are you engaged in there?
A. Farm most of the time, and I am the Post Master.
Q. Were you in Sallisaw the evening that brakeman George
aylor was killed up there?
A. I don't know about his duties; I was there when a brakeman
as killed.
Q. Did not know the man's name?
A. No, sir.
Q. Where was he killed?
A. West of the depot there.
Q. How far from that street crossing west of the platform?
A. Well sir, I don't know; I saw the cars run together; I did not
now he was in there but saw the cars run together, and I saw a man
ll and I walked back and says to Mr. Read, "I wonder if some one
dead up there."
Q. As the cars came together, did you see a man on top of the
ain?
A. Yes, sir. He was motioning his hands up and down.
Q. About how many motions?
A. I don't know anything about that. I was going to meet the
ain to cancel the stamps and I saw this man on top of the cars, I
on't know who it was, making these motions, and I says, "these cars
re going to run together like hell."

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Q. That attracted your attention?

A. The man on top of the cars.

143 Q. About how far was he from the end of the train coming back?

A. I don't know anything about that at all; could not tell anything about that.

Q. You did not see the brakeman that was killed until he fell?

A. Not until he fell, I says, "There is a dead man up there." I went back to the office and Read went up there to see where he was.

Cross-examination:

Q. You are the Post Master up there?

A. Yes, sir.

Q. Do you know where the engine was at the time this cut of cars came back?

A. I do not.

Q. Attached to the string of cars?

A. I do not know that.

144 *Testimony of C. A. Bosshardt.*

C. A. BOSSHARDT, a witness for the defendant, being duly sworn testified as follows:

Q. Where do you live?

A. In Little Rock, Ark.

Q. How long have you lived there?

A. Seventeen years.

Q. What business are you in?

A. Division foreman of the Car Department of the Iron Mountain road.

Q. In the building shops?

A. Building cars, repairing, etc.

Q. Are you familiar with the construction of the cars of the Missouri Pacific—Iron Mountain System.

A. I am.

Q. Did you build these cars?

A. Yes, sir.

Q. Explain to the jury how the draw heads are fastened in a car, and where?

A. The draw bar is connected with two draft-timbers, and there is an A. C. attachment—what is know- as two long rods with a cross key in it, or it is a yoke. After the coupler is fastened in it——

Mr. CHEW: We want to object to the testimony here as to the construction generally of the cars; if Mr. Boshardt knows how these cars were constructed, I think the testimony ought to be confined to the construction of these two cars.

Mr. MILES: The testimony will show later on that these cars are all made to standard; that every timber in every car is the same size at the same place; every car that is built is built to a blue print standard; and every one is built just like every other one. He was

speaking about an attachment, I do not care particularly about that. The question was to explain how the draw bars were fixed in the cars.

145 The COURT: He can go ahead.

Mr. MILES:

Q. Are all the cars of the Missouri Pacific-Iron Mountain System built to a standard or not?

A. Yes, sir.

Q. All built alike?

A. Yes, sir.

Q. What I want to get at is how the draw bar is fixed in the car—I mean the draft timbers, how they are fixed in the end of the car; I am not particular about the key or yoke?

A. The draft timbers set under the cars lengthways and fastens to the two center sills.

Q. What size timbers are the draft timbers?

A. Standard are 4¾ inches thick and nine and ten inches wide and seven feet long. They are right under the car and fastened to the end of the car—out just beyond the end 4¾ inches where the dead wood rests on the draft timbers.

Q. Stick out under the car 4¾ inches?

A. Yes, sir.

Q. It is over that that the dead wood sits?

A. Yes, sir.

Q. It is how long?

A. Twenty-four inches long and 4¾ inches thick.

Q. How far are the draft timbers placed from the outer edge of the car in towards the center?

A. The car is nine feet wide and the draft timbers are 4¼ inches from the center of the car, which makes 8½ inches.

Q. Between the sides of the two draft timbers?

A. Yes, sir.

Q. In between that space is where the draw bar works?

A. Yes, sir.

Q. What was the size of the shank of a draw bar, link and pin?

146 A. Five by five.

Q. What is the size of the shank of a draw bar of Missouri Pacific automatic coupler?

A. Five by five and five by six for eighty thousand capacity cars.

Q. But for sixty thousand five by five?

A. Yes, sir.

Q. Mr. Bosshardt, what is meant by the center of the draft line?

A. Center of the draft line runs parallel lengthway of the car, right through the middle line of the coupler, middle of the shank of the coupler.

Q. In measuring the height of the draw bar, Mr. Bosshardt, the height of the center of the draft line, how would you do that?

A. Measure from the top of the rail to the bottom of the sill. To illustrate, if a car measures forty inches from the top of the rail to the bottom of the car, the center of the draft line—the center of the shank—of the coupler sets six inches below the sill, and deduct six inches from forty would leave 34.

Q. So to measure properly, you measure from the top of the rail perpendicularly to the base of the sill?

A. Yes, sir.

Q. And then deduct six inches?

A. Yes, that is the standard of all timbers; the shank of the coupler is six inches from the bottom of the sill.

Q. You could make that measurement regardless of whether or not the draft timbers were destroyed or not?

A. Yes, sir.

Q. Are the cars of Missouri Pacific-Iron Mountain System all constructed to the same standard?

A. Yes, sir; on the same blue prints.

Q. If a car is first built and adjusted to the proper height, what will lower the height from time to time?

147 A. Several things. The wearing of the journal will lower it, the wearing of the brass will lower it; the wearing of the wheel will lower it; and the load in the car will press on the springs, and the compressing of the springs will lower it, and the general wear and tear drops it a little bit lower.

Q. Will the sinking of the bolts in the draft timbers lower the carrying iron?

A. Yes.

Q. That will lower a draw bar?

A. Yes, sir.

Q. Is it not a fact that anything that will lower the body of the car will lower the draw bar?

A. Yes, sir.

Q. Mr. Bosshardt, has the company provided any means to keep these draw bars up to standard height when this wear and tear takes place?

A. Yes, sir.

Q. What has it done?

A. They use what is known as raising shims.

Q. What are they?

A. Shims are iron—you raise the coupler and drop it over the carrying iron. They are an inch and a half inch thick, and all car inspectors and car repairers are supplied with a supply of them.

Q. If an inspector finds a draw bar below standard he simply lifts the draw head and puts in a half inch or inch shim or a two inch shim and in that way raise it up to the proper height?

A. Yes, sir.

Q. This wear on a car which will lower the draw bars is constantly going on as the train moves?

A. Yes, sir.

148 Cross-examination.

Q. How long have you been in the employ of the Iron Mountain road?

A. Seventeen years.

Q. In the car department?

A. In the locomotive and car department.

Q. How long employed in any other railroad in that department?

A. I worked eight years for the Chicago, Burlington and Quincy road.

Q. Worked for any other?

A. Rock Island and St. Louis.

Q. Any other?

A. No, sir.

Q. Twenty-seven years' experience in this department?

A. Not altogether in the Car Department; in the road department for the Rock Island and St. Louis.

Q. You have had seventeen years' experience in the Iron Mountain Car Department?

A. Yes, Locomotive and Car Department.

Q. Know what is necessary to bring them to standard heights?

A. Yes, sir.

Q. Do you ever remember having seen Iron Mountain No. 11962?

A. I do not remember the car in particular; I remember the series of cars that car was built in.

Q. Where were they built?

A. I could not give you the date on that or what time, our record burned in 1900 in the shop fire.

Q. About how long ago was that series of cars built?

A. I think it was built about nine or ten years ago.

Q. Were they built in the Baring Cross shops?

A. I do not know whether that series were all built there or not.

149 Q. Built a great number at St. Charles, Missouri?

A. Yes, sir.

Q. Built a great number of them at De Soto, Missouri?

A. Yes, sir.

Q. Can you tell this jury where this series of cars were built?

A. I cannot tell that without the records were produced.

Q. You would not tell this jury whether this series of cars was built nine years ago?

A. I would tell them that they were built about that time to the best of my recollection.

Q. You say the records were burned when the shops were burned?

A. Yes, sir.

Q. What shops?

A. At Baring Cross.

Q. If these cars were built at St. Charles, you would have the record?

A. It would show the standard of cars to be maintained.

Q. You would have the record still in existence if built at De Soto or St. Charles?

A. Yes, but I have not that record.

Q. Do you know anything about Missouri Pacific Car No. 12224?

A. No, sir; I do not know anything particular about the car, but I know that series was built at the same time 1100 I. M. was built.

Q. At what shop?

A. I do not know what shop.

Q. How many different shops?

A. St. Louis, De Soto, Little Rock, Ossawatomie in these small shops, a great many are rebuilt. If a car is destroyed in that series, it is rebuilt in the larger shops.

Q. What is the life of a journal of a car?

150 A. The life of a journal runs sev-n or eight years; some do not last so long. 7 or 8 years under fair treatment.

Q. What is the size that works in the journal box?

A. That would depend on the capacity of the car?

Q. This series of cars?

A. They were originally built forty thousand capacity—seven inch journal.

Q. The wheel is put on by compression?

A. Put on the axle not on the journal.

Q. The journal is seven inches long?

A. Yes, sir.

Q. The journal is fastened to the car how?

A. On the end of the axle.

Q. The axle is how long?

A. Depends upon the capacity of the car.

Q. I am speaking about these cars; you know the capacity?

A. The axles are six feet, eleven inches and a quarter, from one end to the other.

Q. What was the capacity of this series of 11962?

A. Forty thousand.

Q. What is the capacity of series of 12224?

A. The same.

Q. Both the same capacity?

Q. Yes, sir.

Q. When you speak about the wear and tear of the journal, you are particular about keeping friction down?

A. As much as possible.

Q. You say the brasses are lined with babbett metal?

A. Yes, sir.

Q. That is placed in the journal box?

A. Yes, sir.

Q. What is the object of putting them in there?

151 A. So it won't run hot; principal object so it won't run hot.

Q. Keep down friction?

A. Yes, sir.

Q. Put the oil and waste—waste is saturated with oil and holds

the oil in suspension, and as the car moves, naturally, the waste would feed the oil to the journal?

A. Yes, sir.

Q. That keeps down friction?

A. To a certain extent.

Q. When friction gets so intense it sets that afire?

A. Yes, sir.

Q. That is what we call a hot box?

A. Yes, sir.

Q. That burns the brass a great deal?

A. Yes, sir.

Q. Do you know anything about the head of the draw bar in Missouri Pacific No. 12224?

A. I don't know anything about that. I did not see the car.

Q. Did you know anything about the height of the draw bar from the center of the draft line the center of the draw bar of Iron Mountain car 11962 on the 18th day of January, 1899?

A. No, sir.

Q. How did you tell Mr. Miles you would measure to get the center of the draw bar?

A. From the top of the rail to the bottom of the sill.

Q. In these standard cars?

A. Yes, sir.

Q. In a standard car, from the top of the rail to the bottom of the sill in the end of the car?

A. Under the car.

Q. Standard of that is how many inches?

A. When new should be forty inches.

152 Q. Then, in putting your draw bar you say you would put it six inches lower than that?

A. Six inches below.

Q. Exactly six inches?

A. When new.

Q. When a car left the shop it would be considered in first class condition?

A. When new, yes sir.

Q. You substract six from forty and that leaves thirty-four?

A. Yes, sir.

Q. M-asured from the top of the rail to the center of the draft line perpendicularly, just exactly 34 inches?

A. Yes, sir.

Q. And no more?

A. It may vary the eighth of an inch or a quarter.

Q. That is the way you would get the standard height of these cars, is to measure from the face of the rail to the bottom of the sill of the car to get the forty inches?

A. On a damaged car.

Q. On a new car?

A. We have a gauge.

Q. What is that?

A. Gauge sets it at 34 inches.

Q. What would set 34 inches?
A. Thirty-four and a half is Master Car Builder's Rules.
Q. You say they would have 34 inches before leaving the shop?
A. May vary a quarter of an inch.
Q. Your gauge does not vary?
A. No, sir.
Q. If a brakeman should have to lift an automatic draw bar three or four inches so as to make it couple with a link and pin coupler, they would not then be of uniform height?

Defendant objected: Objection sustained.

153 Redirect examination:

Q. Can you give the jury some idea of how many of these standard cars have been turned out under your supervision?
A. New cars built.
Q. Yes, and rebuilt.
A. We have a lot of repairs, the average is two cars a day at Little Rock.
Q. How many new cars do you build there every month?
A. We turned out nineteen last week—new cars destroyed and heavily wrecked, body destroyed, and built them from the ground up.
Q. If a car of a certain series or a certain number is totally destroyed you rebuild another car and put the same number and initials on it?
A. Yes, sir.
Q. So as to keep the series up?
A. Yes, sir.
Q. You built nineteen last week?
A. Yes, sir.
Q. Did you ever know one of these cars when first built or rebuilt, to be turned out from the shops that did not meet the gauge exactly as to height?
A. No, sir; invariably meet it within a quarter of an inch, because the timbers of all the cars in each series of cars, each piece of wood in the cars is interchangeable with any other car in that series.
Q. In other words, if Iron Mountain car No. 11000 was taken to pieces, and Iron Mountain 12000 was taken to pieces, being in the same series and, therefore, having interchangeable timbers, you could interchange their timbers back and forth and rebuild the cars?
A. Yes, sir.
Q. Could use half the timbers in one and half the timbers in the others?
A. Yes, sir.
Q. Everything is built to a standard and they are all interchangeable?
154 A. Yes, sir.
Q. You say you never knew one to be taken out of the shop

that the center of the draw bar did not meet the gauge to within a quarter of an inch?

A. Yes, they will do that, because all the timbers are alike.

Q. Under the interstate commerce Commission Law you have a variation of three inches?

A. Yes; 33½ to 34½.

Mr. CHEW:

Q. What is the variation, what is it ordinarily?

Defendant objected.

The COURT: I do not think the question propounded by Mr. Miles or Mr. Chew has anything to do with the question. It is a question of law.

155 *Testimony of C. R. Dobson.*

C. R. DOBSON, a witness for the defendant, being duly sworn, testified as follows:

Q. Where do you live?

A. St. Louis, Mo.

Q. How long have you lived there?

A. About four years.

Q. Where did you live before living in St. Louis?

A. De Soto, Mo.

Q. Where is that with reference to St. Louis?

A. Forty-two miles south.

Q. What business are you engaged in?

A. I am foreman of the car department at St. Louis.

Q. For what company?

A. St. Louis, Iron Mountain and Southern Railway Company.

Q. What business were you engaged in at De Soto?

A. I was shop inspector.

Q. How long have you been in the service of the St. Louis, Iron Mountain and Southern Railway?

A. Nearly nine years.

Q. How long have you been in the railroad service in all?

A. Since I was nineteen; I am thirty-seven now.

Q. About eighteen years?

A. Yes, sir.

Q. Are you familiar with the standards upon which the System cars of the Missouri Pacific-Iron Mountain cars are built?

A. Yes, sir.

Q. Explain to the jury the place where and the manner in which the link and pin draw bars were attached to the cars?

A. The link and pin draw bars were fastened to the draft timbers; in the first place the draft timbers are fastened to the bottom side of the draft sill or longitudinal sill, then the coupler was attached to the draft timbers with an A. C. key and two rods.

156 Q. What is an A. C. key?

A. A piece of iron one by five by twenty four inches.

Q. With a hole in the end—hole in each end?
A. Yes, that goes through the coupler or link and pin draw bar.
Q. Through the shank?
A. Middle way through the shank.
Q. Also goes through the draft timbers?
A. Yes, sir.
Q. Also put the draft rods on that?
A. Yes, and couple to the other coupler at the far end.
Q. What are the sizes of these timbers?
A. Different sizes: 5 by 8 or 4½ by 8; 4 by 9 and 4½ by 10, about that time.
Q. Have some different series now, according to the capacity of the cars?
A. Yes, sir, and the series.
Q. Are you familiar with series 11962?
A. Yes, all the eleven thousand series are all built from the same pat-ern, same blue print and same specifications.
Q. How do you determine the height of a draw bar above the top of the rail?
A. Usually we have what we call a gauge, standard height gauge, we set it on the rail, we have a long straight edge and set this on the rail and get the height at the middle of the shank of the draw bar.
Q. Suppose the draw bar is broken, how do you determine the height?
A. Measure from the top of the rail to the bottom of the sill, then deduct the difference between this to the center of the draw bar, then you determine by using the gauge the exact number of feet and inches that it is to the center of the draw bar, or draft line.
157 Q. Where was that series of cars built? No. 11962?
A. St. Charles, Missouri.
Q. Was that series all built upon the same blue print?
A. Yes, sir.
Q. Same standard?
A. Yes, sir.
Q. Are you familiar with Missouri Pacific No. 12224 Standard?
A. It is virtually the same car, with the exception that there is a little difference in the side drafts.
Q. Are the timbers the same?
A. The draft sills and end sills and the general construction of the car is the same.
Q. Couplers the same?
A. Supposed to be exactly the same.
Q. How long have you been in the building department?
A. I held several different positions in the constructions of cars since I have been working for the Iron Mountain. I have been in car building about 14 years, probably a little less.
Q. How many cars does the De Soto shops turn out?
A. When I was there 32 rebuilt cars per month, cars that un-

dergo repairs for burning, and of decaying parts of timbers or any betterments or anything put on the car at that time.

Q. How many new cars did you turn out per month?

A. Built very few new cars, built only those filling in vacant numbers of cars destroyed.

Q. How many does the St. Louis shop turn out?

A. At that time about 48 per month.

Q. How many does it turn out now?

A. Run anywhere from 45 to 55 a week.

Q. How many new system cars do you suppose you ever inspected since you have been connected with the Company to determine the exact adjustment?

158 A. So many I cannot say.

Q. Could you give us some idea?

A. The fact of course is I inspected lots and lots of cars that received light repairs something like thirty or forty a week in addition I figure on at least 200 per month that passed through the shop.

Q. Those that were rebuilt and those needing only slight repairs, about 200 per month.

A. Something near that figure.

Q. When these cars are rebuilt or repaired, are they always inspected before turned out?

A. Yes, sir.

Q. Whose duty was it?

A. Shop inspector's duty.

Q. How long were you shop inspector?

A. About four years.

Q. Did you ever know of a car to be taken out of the shop, while you were shop inspector that did not meet the standard gauge as to height of draw bars?

A. No, sir, because the shop inspector's position depends upon the accuracy of his inspecting them properly; I do not know if there ever was a possibility of it, but I don't hardly think an inspector would be reckless enough to let one go out, because if he did, and it was discovered his job was gone.

Q. Where were these cars inspected?

A. Both in and out of the shop by the inspector.

Q. Sent out over the inspection track.

A. Yes, have a track for that purpose.

Q. After a car is built to standard and the draw bar of a standard height, what things will affect it so as to lower the draw bar from time to time?

A. Quite a number of different causes for lowering a draw
159 bar. A brass wearing will let the draw bar down, the wearing of the journal will lower it, weak springs after it has been in service for a long time will lower it. Anything that will lower the body of the car will lower it. Then sometimes the draft timbers will lower it some caused from different causes. Sometimes the bolts will pull down in the draft sills; sometimes the carrying iron bolts that hold the carrying iron in the dead wood, will

pull down in the dead wood a little, and sometime- the nuts or taps on the bolts will turn down a little.

Q. All these things will have a tendency to lower it?

A. Yes, sir.

Q. What provision has the Company made to meet this constant lowering?

A. One provision is to take the cars in to the repair track when found below the standard height, if they need no other repairs generally raise the coupler up and put in another draft timber; sometimes cut out the draft timber a little on the bottom and raise the carrying iron. Usually when in service they furnish what we call a cast raising iron, that is what we usually term it.

Q. Same thing as a shim?

A. It is a shim; fits down over the carrying iron like this, and the coupler rests on top of it, and holds it on top of the carrying iron.

Q. Raise the coupler up, according to the thickness of the shim?

A. Yes, sir.

Q. How thick are they?

A. We have two sizes half inch and an inch in thickness.

Q. That holds the shank of the draw bar up?

A. Yes, sir.

Q. According to the thickness of the shim used under it?

A. Yes, sir, a half inch shim would probably raise the
160 coupler three quarters of an inch account of the back end of the coupler being fastened and whole coupler not being raised.

Q. One end being fastened down there it would be like that?

A. Yes, sir, because the shim is back from the head and has a tendency to raise the outside more than where the shim is, an inch raising iron would raise it from an inch to an inch and a half.

Cross-examination:

Q. How broad is a carrying iron?

A. One by three, 18 inches long, except at the brakestaff end, and it is 24 inches long.

Q. Car- only has one brake staff to them?

A. We have some cars with two.

Q. These two standard cars only had one?

A. Yes, sir.

Q. Carrying iron is a piece of iron 18 inches long, an inch thick and an inch broad?

A. Yes, sir.

Q. The shim fits down over this three inch bar of iron?

A. Yes, wider between these two lips than the three inch iron.

Q. How broad is the shim iron on top?

A. About four inches.

Q. An inch shim is molded in the same mold except thicker than a half inch shim?

A. Yes, sir.

Q. The lips on it where it is put down over the carrying iron, it simply holds it in place?

A. Yes, sir.

Q. Suppose you put a half inch shim on the carrying iron and had to raise it another half inch, could you put another half inch shim on that shim?

A. Take it out and put in an inch shim.

161 Q. Wanted it an inch and a half higher could not do that?

A. No, sir.

Q. You say a great many things lower a draw bar?

A. Yes, sir.

Q. The carrying iron you speak of is a piece of iron bolted to the dead wood or buffer wood at the end of the car?

A. Yes, sir.

Q. And the draw head has some lateral motion and rests on that carrying iron?

A. Yes, sir.

Q. The link and pin coupler you speak of are fastened to the draft timbers back at the center of the car?

A. No, sir, the center of the draft timbers.

Q. The draft timbers are how long?

A. We have different lengths.

Q. In these standard cars?

A. Seven feet long.

Q. The space between these draft timbers is about four inches?

A. I do not wish to say that the coupler is fastened in the middle of these draft timbers.

Q. You speak about this A. C. key that slips in the rod that goes through the neck of the draw head, what is the size of that rod?

A. Inch and a quarter.

Q. Reaches from one end of the car to the other?

A. Yes, sir.

Q. You speak about many things that would lower a draw bar?

A. Yes, sir.

Q. The nut where the carrying iron is bolted would that be screwed on the upper or under side?

A. Under side.

Q. Cut into the wood and lower the draw bar?

162 A. No, sir; I said that the head of the bolt would draw down in the timber.

Q. That would let the bolt come down?

A. Yes, and drop the carrying iron.

Q. What is the life of this buffer wood?

A. What do you mean, under fair usage?

Q. Yes, sir.

A. They run eight or ten years.

Q. Takes the bolt a long time to wear down there so as to lower that carrying iron so as to lower the draw head?

A. Owing to the piece of timber on the car.

Q. The kind of timber on these standard cars?

A. That would depend entirely upon the condition of the timber in the cars.

Q. Do you remember anything about the condition of the timber in these cars?

A. I don't in one but do in the other.

Q. Which one?

A. 11962, when it passed through the shops.

Q. When did it pass through the shops?

A. In July, 1896.

Q. What shop do you speak of?

A. De Soto.

Q. Know whether there was anything done to it in the shops at Baring Cross?

A. I do not.

Q. Where was I. M. 11962 built?

A. At St. Charles.

Q. Where was M. P. car No. 12224 built?

A. I am not positive, but I think the American Car Foundry at St. Louis.

Q. You did not have anything to do with the inspection of that car?

163 A. Not when built new, but 11962 passed through the shops and received full and usual repairs.

Q. Do you know anything about the condition of the two draw heads on the cars I have mentioned here on the 18th day of January, 1899?

A. No, sir.

Q. Do you know when and where it was last inspected?

A. I do not.

Q. You speak about a brass wearing down, what is the life of a brass?

A. Depends on the lubrication the journal has.

Q. The amount of friction it is exposed to?

A. Yes, sir.

Q. Hot box will burn it out in a short distance?

A. Yes, sir.

Q. All brasses are lined with babbett metal?

A. Majority are.

Q. Such as you see here?

A. Yes, sir.

Q. That babbett metal works on top of the journal in the journal box?

A. Yes, sir.

Q. Do you know anything about the condition of the brasses in the journal boxes of these two cars we have been asking you about on the 18th day of January, 1899?

A. No, sir.

Q. Know anything about the life of a spring?

A. Yes, sir.

Q. How long do they last?

A. The life of a spring ought to be at least five years, guar-teed for five, may run ten years. At that time.

Q. Guaranteed for five years?

A. They were up to that time, two or three months ago they cut it to three years.

164 Q. Spiral springs. Four coils of springs set of brass or steel plates. Do you know anything about the condition of the springs under these cars on the 18th day of January, 1899?

A. No, sir.

Q. Know how long they had been under these cars?

A. I do not.

Q. How much wear would be to a journal of a car on a run of 28 miles or an hour and a half?

A. Would be very small.

Q. Could you discern it?

Q. You could by callipering it closely, and it would take a mighty fine figure to find it out.

Q. Running twenty eight miles under these circumstances if nothing happens to the journal box and it was properly lubricated with waste and oil, you could not at the end of 28 miles discern the lowering of the draw bar?

A. No, sir.

Q. If the babbett metal should get hot and melt out, could you discern any difference?

A. Yes, wear a quarter of an inch off.

Q. How much would that let the car down?

A. Would not let it down a quarter of an inch.

Q. This guage you speak of, is it wood or iron?

A. Wood.

Q. How thick?

A. Depends on the size of the lumber you make it of.

Q. What size you use?

A. Three quarters of an inch thick and three inches wide.

Q. What is the height of this car when taken out of the shop from the face of the rail to the center of the draw bar?

A. Supposed to be 34½ inches, or within at least a quarter of an inch.

165 Mr. MILES:

Q. When the draft timbers are destroyed you measure from the top of the rail to the bottom of the sill and deduct six inches?

A. Yes, sir.

Q. When a new car comes out you set the gauge to it?

A. Yes, sir.

Mr. CHEW:

Q. Who was car inspector at Van Buren, Jan. 18, 1899?

A. I do not know I am sure I could not tell you.

Q. Know whether these cars were inspected there that day?

A. I do not.

166 *Testimony of W. H. McPherson.*

W. H. McPHERSON, a witness for the defendant, testified:

On the evening of the day on which the deceased, George Taylor, lost his life, he (McPherson) was at that time Car Inspector of the St. Louis, Iron Mountain and Southern Railway Company, at Van Buren, Arkansas; was sent to Sallisaw, I. T. where the accident occurred, to inspect the cars and to note, if possible, any defects; that he went there immediately, arriving about three hours after the accident; that the cars between which George Taylor was killed were yet standing on the track, and that he made a very careful examination, inspection and measurement of said cars. That amongst other things he measured the exact distance of the center of the draft line in the draw heads above the top of the rail, and found that in Missouri Pacific Car No. 12224, the draw bar was thirty-three and one half inches from the top of the rail to the center of the draft line, and that the center of the draft line was the center of the draw bar. That the draw bar in St. L. I. M. & S. Ry. car No. 11962, was, by actual measurement from the top of the rail to the center of the draft line of said draw bar, thirty-two and one half inches, and that the center of the draft line was the center of the draw bar, thereby showing a difference in variation of one inch between the center of the draft line of said draw bars, when measured perpendicularly from the top of the rail on which said cars were standing.

167 *Testimony of M. D. Sanders.*

M. D. SANDERS, a witness for the defendant, testified:

That at the time of the accident in which George Taylor lost his life at the station of Sallisaw, Indian Territory, that M. D. Sanders was joint car inspector for the Kansas City Southern Railway and the St. Louis, Iron Mountain and Southern Railway Company, at the station of Sallisaw aforesaid. That he was called upon to examine, inspect and measure the two cars in the collision between which the said George Taylor lost his life; that he made such examination, inspection and measurement within a very few minutes after Taylor was killed; that he measured the height of the draw bar in each car at the ends where the same came together in the collision, from the top of the rail on which the cars were standing to the center of the draft line, and the centers of the draft lines were the centers of the draw bars; that he found M. P. car No. 12224 to be thirty-three and one half inches above the top of the rail to the center of the draft line in its draw bar; and the draw bar in I. M. car No. 11962 to be thirty-two and one half inches above the top of the rail to the center of its draft line, measured perpendicularly from said rail, and that there was a difference of just one inch between the centers of the draft line of the two draw bars in the cars which came together when the same were measured perpendicularly above the top of the rail.

That he was coming from the K. C. P. & G. depot across through

town to the Iron Mountain depot and when he reached a point about one block from the Iron Mountain railroad, he noticed the cars coming together very hard on the I. M. track. Then he looked to where cars came together and saw one car off track from the distance where he was. Before he had got there they had picked the injured man up and was on their way to the depot with him. M. P. 12224 was off track, and was back so far it could not clear passing track. Conductor went to work and pulled car up on rails so as to let passenger train by and then we put car on track. Draw head
168 to that car was broken and one piece of draw head spring was damaged. The column at the top was damaged by the arch sill of the car it struck. The draft timber was damaged; about half broken out, and also brake staff was bent so badly he could not put it back into the carrying iron.

Q. State condition of I. M. 11962?

A. A knuckle in automatic coupler was broken on this car and dead wood, one draft timber and truss rod was bent so badly I could not get it up. I jacked car up so as to enter link into the other draw head and coupled them together to go forward. There were two pieces of siding burst. One piece of roofing was split and part of facing board at top was split.

Q. When the cars ran together on the main track, or struck, in what part of the town were you, and in what direction were you from the cars?

A. I was coming down the street almost in line with the seed house at Sallisaw, and was walking with G. W. Reeves, and saw the cars going down the main track—In a short time they did hit. I could not see the cars when they struck the other cars, but I could see a portion of them as there were several cars in the cut that struck the cars standing on the main track; I kept going, though, in the direction of the cars, and in a short time I could see that one car was off the track. When or about the time the cars struck, I saw the engine going away from the cars.

The defendant offered to show by witness M. D. Sanders that while walking along with G. W. Reeves at a time when the cars were coming together between which Taylor was killed he observed the great speed at which the train was moving and instantly remarked to witness Reeves, "Those cars are going to hit like hell"; that this remark was made just a moment before the cars came together.

The court excluded this statement, and the defendant, at the time saved its exceptions.

169 *Testimony of T. K. Constant.*

T. K. CONSTANT, a witness for defendant, being duly sworn, testified as follows:

Q. You live here in Van Buren, Ark.?
A. Yes, sir.
Q. What business are you engaged in?
A. Locomotive engineer.

Q. What road?
A. St. Louis, Iron Mountain and Southern.
Q. How long have you been in the service?
A. Engineer in through freight service since 1891.
Q. How long in train service altogether?
A. Since 1886 on Central Division and Arkansas Division.
Q. About eighteen years?
A. Yes, sir.
Q. Were you the engineer in charge of the engine at Sallisaw at the time George Taylor was killed?
A. Yes, sir.
Q. You kicked these cars down the main line?
A. Yes, sir.
Q. Do you remember how many cars you kicked down the main line?
A. Yes, sir. I think twelve loads and two empties.
Q. Who gave you the signal to kick the cars.
A. Witt.
Q. How far away from you?
A. Two car lengths to the best of my knowledge.
Q. What sort of a signal did he give you?
A. Kick sign.
Q. How many cars did you have hold of at the time?
A. I think two after we were detached, cut loose.
Q. That left 12 coming down the main line?
A. 12 loads and 2 empties.
Q. Give the jury your best impression as to the speed at which you turned those cars loose down the main line?
170 A. When we first came up there we made one cut and threw a car down the main line, and did not get over switch—clear switch—so we would not have to pull forward—and we went in and cut the air hose, and pulled down on the car and he gave a signal to kick them, and I could not kick them like I wanted because the brakes were set on the cars detached from the engine, and he had to bleed them.
Q. What do you mean by bleeding them?
A. The pressure in there becomes greater and the brake will not release unless you reduce the pressure in the auxiliary.
Q. How do you do that?
A. By pulling a rod called the bleeding rod, by pulling that it lets the air out.
Q. Go ahead and tell us your best judgment as to how fast those cars were kicked down the main line?
A. I do not know exactly how fast, but gave a good start faster than a man can walk.
Q. About how many miles?
A. Somewhere in the neighborhood of between six and ten miles per hour. I figured on kicking them down so as to clear the switch.
Q. What would they have to do in order to clear the switch?
A. Go back 15 or 17 car lengths of where I stopped.
Q. Where did you stop with reference to the target?
A. Fifteen or sixteen car lengths from the switch West.

Q. Would not be possible for you to shove the cars back in order to clear the switch?

A. At that time I did not know it, but when that occurred I went back and saw this car was not in the clear.

Q. After they struck and the wreck occurred, you kicked back down clear beyond the switch?

A. No sir, would not clear by six feet.

Q. After they struck these six cars it run off the track and stopped?

A. Yes, sir.

171 Q. Did you notice how far it ran on the ground after it had gone off the track?

A. I did not pay close attention to it.

Cross-examination:

Q. When you pulled into the town of Sallisaw you cut the train in two and left about six cars and the caboose standing on the main line?

A. Somewhere in that neighborhood—a few cars on the main line.

Q. Was the Caboose west of the depot?

A. Appeared to me like nearest the road crossing west of the depot.

Q. It was some west of the depot then was it?

A. Somewhere in the neighborhood of the depot.

Q. How far was the west car on the main track west of the depot?

A. Somewhere in the neighborhood of about six car lengths.

Q. Pulled on over west of the switch target?

A. Did not come to a dead stop.

Q. You went on with the cars you had attached?

A. Yes, sir.

Q. How many cars in your train?

A. We had twenty loads and two empties I think.

Q. If you left six down there you had sixteen?

A. Yes, sir.

Q. Went on over west of the switch that was thrown to the side track and kicked a car in?

A. Yes, sir.

Q. Then you had to back and put another car on the side track—what car was that?

A. We kicked one car I think in the switch, and then you mean we had cut off, I think 14 cars, and pulled down on these cars and the air set and we had to bleed them, then we kicked this cut

172 down the main line where the rear end of the train was standing.

Q. How far west of the target had you give- it a kick?

A. It must have been 23 or 24 cars.

Q. You gave it a kick intending to give it velocity enough to pass the clearing post so you could go back in the side track?

A. Yes.

Q. How far is the clearing post east of the switch target at the west end?

A. Must be in the neighborhood of 75 or 85 feet east of the switch stand west.

Q. On this side of the track going west?

A. Yes, sir.

Q. Left hand side?

A. On the left hand side going west.

Q. You say it was going about as fast as you can walk?

A. As fast as that and probably faster.

Q. Was the track up or down grade going east there?

A. Very little up hill.

Q. You cut the cars so as to leave two cars with the engine?

A. Yes, sir.

Q. Then you found the brake set on those fourteen cars?

A. I did not find the brakes set, but when I opened the throttle and gave the engine steam she would not move, and knew the brakes were set by reason of the air.

Q. Do you know how many cars brake was applied to?

A. Four or five we had six or seven cars of air.

Q. Applied to them all?

A. Yes, sir.

Q. Where was Mr. Witt as to the switch stand—east or west of it?

A. West of the switch stand on the north side of the track.

Q. How far?

173 A. Somewhere in the neighborhood of 20 or 21 car lengths.

Q. How far were you from the string of cars you gave a kick at the time, the east end of the string of cars that came in contact with the west end of the string of cars on the main track?

A. The head end of this string of cars must have been 18 car lengths.

Q. Away from the west end of the switch?

A. 20 or 22 car lengths from the switch.

Q. Was your engine exhausted much?

A. Standing still at the time.

Q. Did she exhaust any at all there?

A. When the air pipe worked.

Q. The air pipe is just a cylinder running up and down?

A. Air cylinder on the end controlling the air pressure.

Q. Noise engine makes on air chest?

A. Makes it in the front end.

Q. Do you know where Witt was?

A. When they were back on the main line?

Q. Yes, sir.

A. Standing down on the ground close to me, three or four car lengths.

Q. East of you?

A. Just east of me.

Q. There were at least 18 cars between the cars you had attached to your engine, east end of the cars you had attached to your engine and the west end of the cars you gave a kick to?

A. Somewhere in that neighborhood.

Mr. MILES:

Q. You said the only exhaust your engine made was the air pipe?
A. That is when we were standing still.
Q. When you start out how about it?
A. Good exhaust out of there, because we had 16 cars to move.
Q. And moved pretty fast?
174 A. I gave a good start.
Q. How did the engine go when you gave it a kick, the exhaust was pretty fast?
A. Getting faster all the way until I turned them loose.

Mr. CHEW:

Q. Did you see Lattin on top of these cars?
A. Yes, sir.
Q. Where was he?
A. On front car in the cut going down the main line.
Q. The first car?
A. On the east end of the cut going down main line.
Q. On top?
A. Yes, sir.
Q. Was he giving signals?
A. About the time Witt gave a signal to stop, Lattin gave me a slow signal.
Q. How is it given, (here witness made a slow signal).
Q. You tell the jury he was on the car on the east end of that cut?
A. He was on the east end of the cut of cars going down the main line.
Q. Which end?
A. I could not say positively; I saw him turn around and run back this way and start to the east end of the car and stopped; I was sitting on the engine for signals and did not pay much attention, pretty soon I saw every body running.
Q. You were on the north side of the track?
A. Yes, sir.
Q. On the right hand side of the engine?
A. Yes, sir.
Q. Did you see Taylor down in the field there?
A. I saw him when they cut the cars off; he cut the first cut on the main line.
175 Q. Did you see him any more after that?
A. It appears to me that I saw him run around the corner of the car, but I will not say positively.
Q. How fast were the cars traveling at that time?
A. I could not say exactly, all I know I heard them back there bleeding the air.
Q. That is all you saw?
A. Yes, sir.

Mr. MILES:

Q. You were watching Mr. Lattin all the time before you turned the cars loose?

A. I saw him on the car and when he went to the east end of the car again, and after that I did not pay much attention to him.

Q. Don't know whether he was jumping up and down on top of the car when they hit or not?

A. I don't know.

Q. Might have given signal to brakeman?

A. Yes, sir.

Mr. CHEW:

Q. How close were the two men to the string of cars?

A. I don't know where one of the men was.

Mr. MILES:

Q. You don't know where Marshall was?

A. No, sir.

176 *Testimony of J. M. Walsh.*

J. M. WALSH, a witness for the defendant, being duly sworn, testified as follows:

Q. Where do you live?

A. St. Louis.

Q. Where did you live before moving to St. Louis?

A. Van Buren, Ark.

Q. How long did you live in Van Buren?

A. About six years.

Q. What business are you engaged in now?

A. Superintendent of Terminal of the Missouri Pacific Iron Mountain System.

Q. What position did you occupy here in Van Buren?

A. I was Train Master, Acting Superintendent, and Assistant Superintendent.

Q. Were you living in the town of Van Buren and in the train service here at the time George Taylor was killed?

A. Yes, sir.

Q. What capacity were you working in then?

A. Train master.

Q. Over what division?

A. From Little Rock to Coffeyville.

Q. Where were you on the evening Taylor was killed?

A. At Ft. Smith, when I heard of the accident.

Q. What time did you hear of it?

A. Between four and five o'clock.

Q. Did you go to Sallisaw?

A. Yes, sir.

Q. What time did you get there.

A. I got there about six o'clock.

Q. In the afternoon?

A. Yes, sir.

177 Q. Were the cars still there that came together and killed Taylor?

A. Yes, sir.

Q. What did you do with these cars if anything?

A. I did not do anything with the cars, simply examined them noted the condition of the cars, and let them remain there.

Q. Did you have the cars photographed?

A. Yes, sir.

Q. When was that?

A. I think it was the next day.

Q. Do those photographs you had taken of those cars properly represent the condition of the cars, as you discovered them, upon inspection at the time?

A. Yes, sir; these are the photographs of the two cars I examined at Sallisaw that evening.

Here the photographs referred to were submitted to the jury without objection, and marked exhibit A and exhibit B, and are ordered to be attached to this record.

Q. Did you make any examination of the ground to see where the wreck occurred?

A. Yes, sir.

Q. State to the jury in your own way what you discovered from your investigation there?

A. When I reached Sallisaw, the two cars that were damaged, shown in these photographs, were on the side track, and the only evidence I found besides that of an accident was the marks on the ground where a car had been derailed near the depot.

Q. Did you measure the distance the car had run off the track?

A. Yes, sir; I measured the distance, the wheel marks were on the ground, I also measured the distance from that point to the clearing post at the west end of the siding.

Q. What distance had the car run on the ground after leaving the rail?

178 A. Forty-two feet.

Q. In what direction did it leave the track Mr. Walsh?

A. Wheel marks on the ground indicated that the car moved east and south, that would be moving in the direction of the side track, the main track being on the north side of the side track.

Q. Did both wheels of the truck leave the track?

A. From the distance the wheel marks were from the rail I would say they did.

Q. How far did the wheel marks of the north wheels leave the north rail?

A. About three feet.

Q. How far was it from where the car was derailed to the clearing post at the west target?

A. I think it was about five hundred feet.

Q. How long have you been in the railroad service?

A. Since 1879.

Q. In what capacities?

A. I served as switchman, brakeman, fireman, conductor, yard master, train master and superintendent.

Q. Have you in your experience as a railroad man, been called upon to examine wrecks on railroads very often?

A. That has been my business for the last fifteen years.

Q. From what you saw of these cars up there, the damaged condition of them, and the manner in which they were damaged, the manner in which that car was derailed, the distance that it ran on the ground what would you say as to the force with which the cars came together.

Plaintiff objected to the question.
Objection sustained by the Court.
The defendant saved its exceptions.

Q. Did you observe these cars Mr. Walsh, and the damage to those cars as shown by the photographs?

A. Yes, sir.

179 Q. State what that was so we can get it on the record?

A. I found one of the cars draw bar broken off just back of the head, found marks at the end of the car, indicating that the ends of the cars had come together, found the draft timbers mashed at the end and burst out on the side, found the dead wood crushed and moved out of place; there were several small marks on the ends of the cars, indicating a collision between the cars. From the report I got——

Mr. CHEW: Never mind the report.

Mr. MILES:

Q. From the damage done to the cars, which you have detailed to the jury, and the marks on the ground, showing the distance the car ran after it left the track, what would you say as to whether or not the force with which the cars came together was extraordinary or unusual or not?

Plaintiff objected.
Objection sustained by the Court.
Defendant saved its exceptions.

Q. From what you observed of these cars there at the time in the light of your experience as a railroad man, would you regard it as safe for a man to be between those cars for the purpose of making a coupling at the time they came together?

Plaintiff objected.
Objection sustained by the Court.
Defendant saved its exceptions.

Q. Mr. Walsh, would the coming together of a train of cars in the usual and ordinary way, of making couplings have left those cars in the condition in which you found them?

Plaintiff objected.
Objection sustained.
Defendant excepted.

Q. Mr. Walsh, if those cars and caboose were left standing on the main track at Sallisaw near the station, or a little west of it,
180 and a cut of fourteen cars was kicked down the main line with such force as to come together that it burst the end boards in one car, burst the roof boards off the other car, break a draw head in good condition off of one flush with the dead wood in the standing car, burst the draft timber in the other car, crush and mash out of line the dead wood in the standing car, throw the approaching car off the track, and cause it to run a distance of forty-two feet on the ground, would you in the light of your experience as a railroad man, and has been detailed to the jury here, say that these cars came together with such force as would render it safe for a brakeman to go between and effect a coupling?

Plaintiff objected.
Objection sustained.
Defendant saved its exceptions.

Q. Mr. Walsh, if you had known nothing about the manner in which these cars came together, if you had made no investigation except to find these cars on the side track, broken and crushed as they appeared to you, and as shown in the photograph, what would have been your opinion as to whether or not these cars had been in a wreck or collision?

Plaintiff objected.
Objection sustained.
Defendant saved its exceptions.

Cross-examination:

Q. Did you make any measurements from the west end of the depot where you found this evidence of car being off the track to the clearing post?
A. Yes, sir.
Q. How did you measure it?
A. With a rule.
Q. Make a minute of it at the time?
A. Yes, sir.
181 Q. Do you know where it is?
A. No, sir.
Q. Did you make a record of it at the time?
A. Yes, sir.
Q. Don't you know where the record is?
A. I do not.
Q. Can you give the jury any better idea than to say it was about 500 feet?
A. Well, I can tell them what my investigation developed.
Q. I am talking about your measurement, you put a rule to it, if you had put a tape line to it you would know exactly.
A. My recollection is it was between five and six hundred feet, but the number of feet I do not remember.
Q. Did you measure from where you found the car off the track to the switch stand?

A. Yes, sir.

Q. From there to the switch stand how far up was it?

A. I am not certain that I measured to the switch stand, but I am certain I measured to the clearing post.

Q. Did you ever measure from the clearing post to the switch stand?

A. No, but I can tell you what that is.

Q. Tell us?

A. 128 feet.

Q. Clearing post is just a little white stob driven down in the ground and painted white?

A. Yes, sir.

Q. Between the main and side track?

A. Yes, sir.

Q. And 128 feet from the switch stand back to it?

A. Yes, that is the standard distance for the clearing posts from switches.

Q. What time did you get to Sallisaw.

182 A. Six o'clock.

Q. It was dark wasn't it?

A. Just about dark.

Q. Wasn't good dark at that time?

A. No, sir, I will not say good dark.

Q. Make the investigation that night?

A. I made my investigation right then as soon as I arrived.

Q. Made the investigation by lights?

A. I had a hand lantern.

Q. Is that all you had?

A. Yes, sir.

Q. When you had these photographs taken, where were these cars?

A. On the spur track leading from the side track.

Q. East or west of the depot?

A. Just west of the depot.

Q. What time of day was it when you had them taken?

A. I don't know, sir.

Q. Your best recollection about it?

A. I was not there when they were taken.

Q. When you found the cars on the spur track, were they near to each other?

A. They were both together on the same track, but separated about ten feet.

Q. Had they been coupled together?

A. No, sir.

Q. Who was the photographer that took these photographs?

A. I don't know, sir.

Q. You cannot tell where his camera was, and in what position these cars were at the time they took these photographs?

A. I can tell you what arrangement I made to have them taken.

Q. I want to get at the facts at the time they were taken, you don't know anything about that?

A. No, sir, I did not see them taken.

183 Q. When they were put off on the side track, do you know how close they were together?

A. No, sir.

Q. Do you know Earl Witt?

A. Yes, sir.

Q. He came down the road with you from Monette, Mo.

A. I do not know what point he got on at, I got on at St. Louis, Mo.

Q. Did you see him between here and Monette, Mo.?

A. Yes, sir.

Q. Rode in the same car with him?

A. Yes, sir.

Mr. MILES:

Q. Are these correct pictures of those cars, Mr. Walsh?

A. Yes, sir.

Q. You recognize in those pictures there the injuries which you discovered in the cars?

A. Yes, sir.

Mr. CHEW:

Q. Was the link in the wreck turned over to you?

A. Yes, sir.

Q. Where is that link?

A. I don't know, sir.

Q. What did you do with it?

A. I gave it to Mr. Car the foreman of the Locomotive and Car Department.

Q. How long after the wreck did you turn it over to him?

A. I don't remember exactly, I kept the broken parts in my office for sometime.

Q. How long afterwards?

A. I do not know whether I can answer correctly, but I would say ten or fifteen days, might possibly have been thirty.

184 Q. How long was that link?

A. I could not tell exactly now.

Q. About how long?

A. About 12 inches.

Q. Was it a standard link?

A. Might be nine, I think it was nearer nine inches.

Q. Was it a standard link?

A. Well, I never saw a standard link. If you say standard for Missouri Pacific—Iron Mountain, I would say it was not.

Mr. MILES:

Q. What system did that link belong to?

A. Louisville and Nashville.

Q. You had all the broken parts here at the last trial of this case?

A. I was not here. I asked Mr. Car where they were and he said

in moving from the old to the new round house they had been misplaced; said they had them here the last trial.

Mr. CHEW:

Q. How many pieces of broken stuff did you have?
A. Two is all I recall.
Q. What were they?
A. Draw bar and link; I say two, three pieces, piece of knuckle draw bar and link.
Q. What draw bar was it?
A. It was a common draw bar, link and pin.
Q. You had that?
A. I had that in my office after the accident.
Q. You were not here at the last trial?
A. No, sir.
Q. You don't know what became of those broken parts?
A. No, sir.
Q. Turned them over to James Car, Foreman of the Locomotive and Car Department?
185 A. Yes, sir.
Q. He is here in town?
A. Yes, sir.
Q. Employed by the Railway Company now?
A. Yes, sir.

Mr. MILES:

Q. Where were you at the last trial?
A. I think I was on the Valley south of Little Rock.
Q. Do you recall whether the face of that old link and pin coupler was rounding or come down perfectly square?
A. I do not recall.

Admission of Parties as to Automatic Couplers.

It was admitted that the law requiring railroads to have their cars equipped with automatic couplers was not in force at the time of this accident.

Agreement of Parties.

It was here agreed that if it became necessary to make up a record in this case, that the action taken by the interstate commerce commission and the American Railway Association shall be set out in *extenso* in the record, which action is set forth as follows:

186 *Proceedings of the Inter-State Commerce Commission and American Railway Association.*

Notice to Common Carriers of the Standard Height of Draw Bars.

At a General Session of the Inter-State Commerce Commission, held at its office in the City of Washington, D. C., on the sixth day of June, A. D. 1893.

Present: Hon. William R. Morrison, Chairman; Hon. Wheelock G. Veazy, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements, Commissioners.

Action taken by Inter-State Commerce & Am. Ry. Asso.

Whereas, by the fifth section of an Act of Congress approved March 2, 1893, entitled "An Act to promote the safety of employees and travellers upon railroads by compelling common carriers engaged in inter-state commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," it is provided, among other things, "that within ninety days from the passage of this Act the American Railway Association is authorized hereby to designate to the Inter-State Commerce Commission the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being
187 certified to the Inter-State Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners or lessees engaged in interstate commerce in the United States by such means as the commission may deem proper." * * * "And after July First, Eighteen Hundred and Ninety Five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

And whereas, the said American Railway Association did thereafter, and within the period of ninety days after the passage of said act, to-wit: on the 26th day of May, 1893, duly file with the Inter-State Commerce Commission the certificate of their action designation and determination in manner and form as follows, viz.:

The American Railway Association.

OFFICE OF THE SECRETARY, 24 PARK PLACE.
NEW YORK, *May* 22, 1893.

To the Honorable the Inter-State Commerce Commission, Washington, D. C.:

In compliance with the fifth section of an act of Congress approved March 2nd, 1893, entitled "An act to promote the safety of employees

and travelers upon railroads by compelling common carriers engaged in inter-state commerce to equip their cars with automatic couplers and continuous brakes; and their locomotives with driving wheel brakes, and for other purposes."

The American Railway Association hereby certifies to your honorable body, that at its regular meeting held at Chicago on April 12, 1893, it adopted resolutions as follows:

Resolved, that the standard height of draw bars for freight cars measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for standard gauge railroads in the United States, shall be thirty-four and one half inches, and the maximum variation from such standard heights to be allowed between
188 the draw bars of empty and loaded cars shall be three inches.

Resolved, that the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for the narrow gauged railroads in the United States, shall be twenty-six inches, and the maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars shall be three inches.

THE AMERICAN RAILWAY ASSOCIATION,
H. S. HAINES, *President.*
W. F. ALLEN, *Secretary.*

Witness:

——— ———.

Now therefore, in pursuance of the provisions of said section five of said act,

It is ordered, that notice be at once given to all common carriers, owners, or lessees engaged in inter-state commerce in the United States, that the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the draw bars, has been designated and determined by the American Railway Association, mentioned in said act, as and to be thirty four and one half inches for standard gauge railroads in the United States, and twenty-six inches for narrow gauge railroads in the United States; that the maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars, both for standard and narrow gaugged railroads in the United States has been fixed and determined by said association at three inches; and that such determination has been duly certified by said association to the Inter-State Commerce Commission.

EDW. A. MOSELY, *Secretary.*

It was further agreed between the parties hereto that the provisions of said safety appliance act requiring all freight cars engaged in inter-state traffic to be equipped with automatic or impact couplers did not go into effect under said law until the 1st day of January, 1900.

189 This was all the testimony introduced in this case.

Thereupon both parties announced their case as closed.

Motion by Def't for Verdict.

Thereupon counsel for the defendant moved the court to direct a verdict in favor of the defendant for the reason that the Congress of the United States has passed no law requiring railroads of the United States, engaged in inter-state commerce, to equip their cars with couplers of uniform and standard height, such as spoken of in the testimony in this case.

Motion Overruled.

Motion of defendant was overruled by the court and defendant saved its exceptions.

Motion to Exclude Testimony of Joe Curtice.

Counsel for defendant moved the court to exclude the entire testimony of witness Joe Curtice, for the reason that the same did not tend to prove or disprove any issue in this case and could serve only to confuse and mislead the jury; which motion was by the court overruled, and the defendant saved its exceptions.

Defendant also moved the court to exclude the portion of the testimony of witness Joe Curtice with reference to the difficulty in effecting a coupling between one of the cars involved in this accident and a car not involved in this accident, because the same did not support any issue in the case, and was incompetent and inadmissible.

Motion Overruled.

This motion of defendant was by the court overruled and the defendant saved its exceptions.

190 Thereupon the court of its own motion instructed the jury as follows:

Court's Instructions.

"A."

The plaintiff must establish by a preponderance of the evidence the facts which the court has told you the plaintiff must prove before he can recover. That is, he must establish those facts by the great weight of the evidence, and before you can in any event find for the plaintiff, you must find from a fair preponderance, or greater weight, of the testimony that the facts, which the court has told you are necessary to plaintiff's recovery, have been established; and if, upon any one of said issues the testimony is evenly balanced and you are unable under your oaths to attach to the testimony for or against the plaintiff the greater weight, then the plaintiff has not established such facts and cannot recover.

I.

The Act of Congress fixes the standard height of loaded cars engaged in inter-state commerce on standard gauge railroad at 31½ inches and unloaded cars at 34½ inches measured perpendicularly from the level of the face of the rails to the centers of the draw bars and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now, the law required that the two cars between which Taylor lost his life should be when unloaded of the equal and uniform height from the level of the face of the rails to the center of the draw bars of thirty four and one half inches and when loaded to the full capacity should be of the uniform height of thirty one and one half inches. Now if the plaintiff by a preponderance of the
191 evidence shows a violation of this duty on part of defendant, then this is negligence and if the proof by a preponderance also shows that this caused or contributed to the death of Taylor then you should find for the plaintiff unless it appears by a preponderance of the evidence that Taylor was wanting in ordinary care for his own safety and that this want of care on Taylor's part for his own safety caused or contributed to the injury and death sued for, in which latter case you should find for the defendant.

To the giving of instruction No. 1, of the court's own motion, the defendant at the time objected, and saved its exceptions.

II.

If there was the difference between the height of the center of the draw bars in the two cars in question as indicated in the first instruction then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for. On that point if such difference existed and but for its existence the injury and death of Taylor would not have happened then such difference is said in law to be an efficient proximate cause of Taylor's injury and death although it may be true that other causes may have cooperated with this one in producing the injury and death of Taylor and but for these other coöperating causes the injury and death of Taylor would not have ensued. But if such difference in height of the center of the draw bars as aforesaid actually existed yet if the injury and death of Taylor would have ensued just the same as it did without the existence of such difference in height of the center of the draw bars then such difference in the height of the center of the draw bars is not in law an efficient proximate cause of the injury and death of Taylor.

The defendant at the time objected to the giving of the court's own motion instruction No. II; and to the action of the court in overruling said objection, the defendant at the time saved its exceptions.

192 III.

If plaintiff has established his case by a preponderance of the evidence you will find a verdict in his favor unless it appears from a

preponderance of the evidence either on behalf of the plaintiff or of the defendant or of them both that George Taylor was wanting in ordinary care for his own safety, and that this want of care on his part caused or contributed to his injury and death in which latter case you should find for the defendant.

To the giving of instruction No. III on motion of the court, the defendant at the time objected; and to the action of the court in overruling said objection, the defendant at the time saved its exceptions.

IV.

If George Taylor went between the cars for the purpose of making a coupling and under all the circumstances an ordinarily prudent person situated as Taylor was would have done so, then his going between the cars was not negligence which will bar a recovery in this action; but if an ordinarily prudent person situated as Taylor was would not under all the circumstances have done so, then Taylor's going between the cars if he did so was negligence on his part which would bar a recovery in this action.

To the giving of instruction No. IV, on motion of the Court, the defendant objected, and to the action of the court in overruling said objection, the defendant at the time saved its exceptions.

V.

Whether there was a difference in the height of the center of the draw bars in the two cars as stated in the first instruction or not, yet if the injury and death of Taylor was caused solely by the want of ordinary care on the part of the engineer or any or all of
193 the other train men the plaintiff cannot recover in this action.

But if there was such a difference in height of the center of the draw bars as before explained and this difference in height if it existed acting together with want of ordinary care on the part of the engineer or other trainmen, if there was such want of ordinary care, caused the injury and death of George Taylor, then the plaintiff can recover in this action if George Taylor at the time exercised ordinary care for his own safety.

To the giving of instruction No. 5, on motion of the Court, the defendant objected, and to the action of the court in overruling said objection, the defendant at the time saved its exceptions.

VI.

If you find for the plaintiff you will find such a sum in money not exceeding the amount sued for in the complaint, which is stated at fifteen thousand dollars as will compensate the widow and minor children of Taylor for the pecuniary loss if any which they have sustained by the death of Taylor, and in determining the amount you may take into consideration the age, health, habits, earning capacity of George Taylor and contributions if any, made by Taylor to his wife and children, together with the loss, if any, of his care and training to his minor children, and you may also consider the age and life expectancy of the widow.

To the giving of instruction No. VI, on the Courts own motion,

the defendant objected, which objection was overruled by the Court; and to the action of the Court in overruling said objection, the defendant at the time saved its exceptions.

VII.

You are the sole and exclusive judges of the credibility of the witnesses and of the weight to be attached to their testimony. In determining what weight you will give to the testimony of a
194 witness, you may take into consideration the witness' interest if he has any in the result of the trial, his bias or prejudice if he has any for or against either party, his means of knowing that about which he testifies, his demeanor on the witness stand, the reasonableness or unreasonableness of his statements and applying your knowledge and observation of human actions, motives and affairs, you will find the truth and present it in your verdict.

To the giving of instruction No. VII, of the court's own motion, over the objection of defendant, defendant at the time excepted.

Thereupon, the defendant asked the court to give to the jury the following instructions, which were refused by the court:

Instructions Asked by the Court and Refused.

Defendant's Instructions Refused by the Court.

1. This action, like all others brought by servant against master for personal injuries sustained in the course of his employment, is based on actual negligence in the defendant, or in those who represent it. The presumption is that the master has done his duty by furnishing safe and suitable appliances for the performance of his work, and when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the master had no notice of the defect and was not negligently ignorant of it. It is not sufficient to show that the employee was injured and that the injury resulted from a defect in the machinery, but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises.

The court refused to give instruction No. 1 asked for by the defendant; and to the action of the court in this regard, the defendant at the time saved its exceptions.

195 2. An employee of a railroad company by virtue of his employment assumes all the ordinary risks and hazards incident to his employment.

The court refused to give instruction No. 2, asked for by the defendant, and to the action of the court in this behalf the defendant saved its exceptions.

3. As between a railroad company and its employees, the railroad is not an insurer of the perfection of any of its machinery, appliances or instrumentalities for the operation of its railroad.

The court refused to give instruction No. 3, asked for by the defendant; and to the action of the court in this regard, the defendant at the time saved its exceptions.

4. As between a railroad company and its employees, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its rail road.

The court refused to give instruction No. 4, asked for by the defendant, and the defendant at the time saved its exceptions to this action of the court.

5. It will be presumed in the absence of anything to the contrary that a rail road company performs its duty in such cases and the burden of proving otherwise will rest upon the party asserting that the railroad company had not performed its duty.

The court refused to give instruction No. 5, asked for by the defendant; and to the action of the court in refusing said instruction, the defendant at the time saved its exceptions.

6. And where an employee seeks to recover damages for
196 injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employee to prove such insufficiency, but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections or insufficiencies complained of, or that by the exercise of reasonable or ordinary care and diligence it might have obtained such notice.

The court refused to give instruction No. 6, asked for by the defendant; and to the action of the court in this regard the defendant at the time saved its exceptions.

7. And proof of a single defective or imperfect operation of any of such machinery or instrumentalities resulting in injury will not, of itself, be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection or insufficiency in such machinery or instrumentalities.

The court refused to give instruction No. 7, asked for by the defendant; and to the action of the court in this regard the defendant at the time saved its exceptions.

8. As between a railroad company and its employés, the railroad company is not necessarily negligent in the use of defective machinery nor obviously defective, and it is negligent in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them and in remedying them.

The court refused to give instruction No. 8, asked for by the defendant; and to the action of the court in this regard the defendant at the time saved its exceptions.

9. If you find from the evidence in this case that death
197 resulted to George W. Taylor by reason of negligence on the part of the engineer in charge of the engine drawing the train on which the injury occurred, such negligence would be the negligence of a fellow-servant of said Taylor, and you should find for the defendant.

The court refused instruction No. 9, asked for by defendant; and the defendant excepted.

10. If you find from the evidence in this case that death resulted to George W. Taylor by reason of the negligence of a brakeman on the train which caused the injury to said Taylor, then the negligence of said brakeman would be the negligence of a fellow servant, and you should find for the defendant.

The court refused to give instruction No. 10, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

11. If you find from the evidence in this case that death resulted to brakeman George W. Taylor by reason of the negligence of the conductor in charge of the train on which said Taylor was killed then the negligence of said conductor would be the negligence of a fellow-servant and you should find for the defendant.

The court refused to give instruction No. 11, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time saved its exceptions.

13. Before the plaintiff can recover in this case, he must establish affirmatively by proof that the deceased at the time he was injured was himself in the exercise of due care.

The court refused to give instruction No. 13, asked for by the defendant; and to this action of the court, the defendant, at the time, excepted.

14. Even though you may find that the defendant rail-
198 road company was guilty of negligence, as set out in plaintiff's complaint, yet, if you further find that the deceased himself, at the time he was killed, was guilty of any negligence, however small, which contributed to bring about his death, then the plaintiff cannot recover in this action, and you should find for the defendant.

The court refused to give instruction No. 14, asked for by the defendant; and to the action of the court in this regard, the defendant at the time, saved its exceptions.

15. If you find from the evidence in this case that brakeman Taylor went in between the cars and attempted to couple the same together at a time when said cars were in motion on the track, and that in consequence of such attempt the cars came together and crushed and killed said Taylor, then the negligence of said Taylor in going between the moving cars would be the proximate cause of his death, and you should find for the defendant.

The court refused to give instruction No. 15, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

16. If you find from the evidence in this case that at the time brakeman Taylor was killed there were a number of cars left standing on the main track at the station of Sallisaw, and that ten or twelve loaded box cars were being moved down the main track towards the standing cars for the purpose of coupling them together; that said cars were moving at about the rate of four miles per hour, and that while said cars were so moving, said Taylor went in be-

tween the moving and standing cars for the purpose of making the coupling, and that said cars came together with such force as to break the drawhead and coupling apparatus and to catch, crush and kill said Taylor, then the action of said Taylor in going between said cars to make said coupling would be the proximate cause of
199 his death, and you should find for the defendant.

The court refused to give instruction No. 16, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, excepted.

17. Before you can find for the plaintiff in this action you must find that there was more than three inches difference in the perpendicular height of the shanks of the draw heads in the two cars which came together and crushed brakeman Taylor, measured from the top of the rail to a horizontal line drawn through the middle of each shank of each draw head; and, further, you must find, if there was such difference, that the difference was due to the improper original construction of the cars, and not due to ordinary wear or incidental breakage of any of the supports in said cars which would affect said heights of said draw bars.

The court refused to give instruction No. 17, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

18. If you find from the evidence in this case that the accident which resulted in the death of brakeman George W. Taylor occurred in the Indian Territory, and that J. Neal, administrator resides in the State of Arkansas, and was appointed administrator under the laws of the State of Arkansas, and has brought this action in the State of Arkansas, then the court tells you that he cannot maintain said action, and you should find for the defendant.

The court refused to give instruction No. 18, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

19. If you find from the evidence in this case that by a statute of the State of Arkansas conductors having superintendence or control over trainmen are not fellow servants with the brake-
200 men and other trainmen, but are vice-principals, and that no such statute is in force in the Indian Territory, and that the death for which damages is claimed in this action occurred in the Indian Territory, then this action cannot be maintained in the State of Arkansas by reason of the dissimilarity of the statutes in the two jurisdictions.

The court refused to give instruction No. 19, asked for by the defendant; and to the action of the court in this regard, the defendant at the time saved its exceptions.

20. If you find from the evidence in this cause that the death of brakeman George W. Taylor was caused by an accident in the Indian Territory, and that this suit for damages on account of such death is brought in the State of Arkansas, and that in the State of Arkansas there is a statute which makes all railway employés in different departments, although in the service of the same company, employed by the same company, paid by the same company, and

laboring to a common purpose, not fellow servants, but vice-principals to each other, and that no such statute exists in the Indian Territory, then this action cannot be maintained in the State of Arkansas by reason of the dissimilarity of the laws of the two jurisdictions touching the same subject matter.

The court refused to give instruction No. 20, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

21. If you find from the evidence that by reason of a law of the State of Arkansas persons who having been injured or killed by reason of the negligence of a railroad company, and who having obtained judgment for such negligent injury or killing, have a lien upon the road bed and franchise of such railroad to secure the collection of such judgment and that no such law as this is in force in the Indian Territory, then this action cannot be maintained
201 in the State of Arkansas, and you should find for the defendant.

The court refused to give instruction No. 21, asked for by the defendant; and to the action of the court in this regard, the defendant at the time saved its exceptions.

22. If you find from the evidence in this cause that although a draw bar may be adjusted to the standard height when the car is first built and turned out of the shop, that the every day wear and tear of the car continually lowers the draw bar—that the defendant in order to provide against this constant lowering of the draw bar, provided an ample supply of shims ready to the hands of the trainmen and car inspectors which may be readily and in a very short time placed under the draw bars so as to restore them to uniform and standard height, then the court tells you that the master has fully performed its duty, and if there was any failure of the trainmen, switching crew or car inspectors to use these shims so provided, such failure was the failure of a fellow servant with the deceased, and you should find for the defendant.

The court refused to give instruction No. 22, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

23. The court tells you that if you find from the evidence in this case the defendant equipped all its cars with uniform and standard height draw bars when such cars are first built and turned out of the shops, then the defendant is only bound to use ordinary care to maintain such draw bars at the uniform and standard height spoken of in the testimony.

The court refused to give instruction No. 23, asked for by the defendant; and to the action of the court in this regard, the defendant at the time, saved its exceptions.

202 24. By center of the draw bar is meant the center of the draw bar shank, or the center of the draft line of the draw bar.

The court refused to give instruction No. 24, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

25. By standard height is meant from 31½ inches to 34½ inches measured perpendicularly from the face of the rail to the center of the draft line in the draw bar.

The court refused to give instruction No. 25, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

26. Cars are of uniform and standard heights when the centers of the draw bar shanks are not less than 31½ inches nor more than 34½ inches, measured perpendicularly, above the face of the rail.

The court refused to give instruction No. 26, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

27. The court charges you that the Act of Congress allows a variation in height of three inches between the centers of the draw bars of all cars used in inter-state commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the center of the draw bar shank or draft line.

The court refused to give instruction No. 27, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

28. The court charges you that when one car is fully loaded and another car in the same train is only partially loaded, the law
203 allows a variation of full three inches between the centers of the draw bars of such cars, without regard to the amount of weight in the partially loaded car.

The court refused to give instruction No. 28, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

29. Before the plaintiff can recover in this case he must show by a preponderance of the testimony that there was more than three inches difference in the height between the centers of the draft lines in the draw bars in the cars between which Taylor lost his life, and that such difference if it existed, was the proximate or producing cause of his death; or that it contributed along with other causes aside from deceased's own conduct to produce such death.

The court refused to give instruction No. 29 asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

30. Before you can find for the plaintiff you must find that there was a difference of more than the law allows between the draw bars at the time the cars came together, and that such difference was the proximate cause of Taylor's death.

The court refused to give instruction No. 30; asked for by the defendant and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

31. In view of the character of the closing argument made by counsel for plaintiff in regard to the difference in the height of the draw bars allowed by law, defendant asks the court to charge the jury that if they find that there was only one inch difference in

the height of the centers of the draw bars in the ends of the cars which came together and killed George Taylor, this difference
204 will not justify you in finding in favor of the plaintiff in this case.

The court refused to give instruction No. 31, asked for by the defendant; and to the action of the court in this regard, the defendant, at the time, saved its exceptions.

After the instructions of the court counsel proceeded with the argument of this cause.

Mr. S. Chew, in his closing argument to the jury made the following statement:

"I want to call your attention to this; where is the link, where is the knuckle, where are these things, that the proof shows at one time were in their possession. Car is here, Walsh is here, Walsh had them, Walsh turned them over to Car, and I challenge them now to bring them into the Court room."

Counsel for defendant at the time objected to this argument on the part of Counsel for plaintiff; the Court overruled defendant's objections, and the defendant saved its exceptions.

After the argument of Counsel, the jury retired to consider of their verdict, and afterwards and on the same day returned into Court the following verdict, to-wit:

"We the jury find for the plaintiff and assess the damages at fourteen thousand dollars.

H. B. HALL, *Foreman.*

Defendant Files Motion for New Trial.

Thereupon the defendant filed its motion for new trial which motion is in words and figures as follows, to-wit:

205 In the Crawford Circuit Court, June Term, 1904.

JONATHAN NEAL, Adm'r of the Estate of George Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Motion for New Trial.

Comes the defendant, the St. Louis, Iron Mountain and Southern Railway Company, and moves the Court to set aside the verdict in this case rendered on the first day of July, 1904, and grant it a new trial for the following reasons, to-wit:

1. The Court had no jurisdiction to try this cause, for the reason that the same is pending in the United States Court, for the Western District of Arkansas, Ft. Smith Division.

2. The court erred in refusing to grant defendant's second petition for removal of this cause, which was made, filed and presented

subsequent to a time when the plaintiff amended his complaint in this cause by interlineation.

3. The court erred in overruling defendant's protest against the jurisdiction of this court, and in denying its motion to dismiss and strike this cause from the docket, filed on the — day of June 1904.

4. The court erred in admitting over the objections of the defendant, improper testimony of witness Earl Witt.

5. The court erred in refusing to instruct the jury to return a verdict in favor of the defendant at the close of the plaintiff's testimony.

6. The court erred in excluding the testimony of B. M. James, Ed Johnson, S. C. Rossin, Charles Frye, and W. D. Alford, as to
206 exclamations made by them at the time of the occurrence of the accident which was offered as a part of the *res gestæ*.

7. The court erred in excluding the statement of M. D. Sanders made to G. W. Reeves at the moment the cars were coming together, which statement defendant maintains is a part of the *res gestæ*.

8. The court erred in refusing to permit witness J. M. Walsh to answer various questions propounded to him by the defendant.

9. The court erred in refusing on motion of the defendant, to direct the jury to return a verdict in favor of the defendant, for the reason that the Congress of the United States has passed no law requiring the railroads of the United States, engaged in inter-state commerce, to equip their cars with coupler of uniform and standard heights, such as spoken of in the testimony in this case.

10. The court erred in overruling defendant's motion to exclude the entire testimony of witness Joe Curtice.

11. The court erred in overruling the motion of defendant to exclude that part of the testimony of witness Joe Curtice with reference to the difficulty of coupling one of the cars involved in this controversy to another car not involved in this controversy on the evening of the accident.

12. The court erred in overruling defendant's objection to the closing argument of S. R. Chew, attorney for the plaintiff, wherein the said Chew argued that the absence of the link, knuckle and coupler involved in the wreck wherein Taylor lost his life, were not produced in court, there being no testimony that any effort was made to get this material testimony, and that no request had been made by counsel for the plaintiff for the same.

13. The court erred in giving instructions numbers "A," 1, 2, 3, 4, 5, 6, and 7, of its own motion, and over the objections of the defendant.

207 14. The court erred in refusing to give instructions numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31, asked for on behalf of defendant.

15. The verdict of the jury was contrary to the evidence.

16. The verdict of the jury was not supported by sufficient evidence.

17. The verdict of the jury was against the overwhelming weight of the evidence.

18. The verdict of the jury was contrary to the law.

19. The verdict of the jury was for an excessive amount, showing that the jury was moved by prejudice, passion and partiality.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
By OSCAR L. MILES AND
LOVICK P. MILES.

And the court having said motion for a new trial under advisement, and being well and sufficiently advised in relation thereto, did overrule the same, and to the action of the court in overruling said motion for a new trial, the defendant at the time saved its exceptions, and prayed an appeal to the Supreme Court, which was granted; and the defendant was given ninety days in which to prepare and file its bill of exceptions herein.

Now comes the defendant and tenders the above and foregoing as and for its bill of exceptions in this cause, and asks that the same be signed, sealed and made a part of the record herein, which is accordingly done.

This 20th day of Aug. 1904.

(Signed) J. H. EVANS, *Judge*.

208 And afterwards, to-wit: At a regular June term of the Crawford Circuit Court, on the 30th day of June, 1904, the following proceedings were had:

JONATHAN NEAL, as Administrator of the Estate of George Taylor, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Now on this day this cause coming on to be heard, and the parties having announced ready, this cause was submitted to a jury by consent, consisting of eleven men, duly and legally empaneled to try this cause, at the hour of adjournment this cause not being concluded, the jury were permitted to separate until 8 o'clock tomorrow morning under the usual admonitions of the Court.

And afterwards at the same term on the 1st day of July, 1904, the following proceedings were had:

Verdict & Judgment.

JONATHAN NEAL, as Administrator of the Estate of George Taylor, Deceased, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Now on this day this cause came on to be heard, when comes the plaintiff by his attorneys Chew & Fitzhugh, and comes the defendant by its attorneys O. L. Miles and Lovic P. Miles and the jury heretofore empanneled to try this cause after having heard the evidence, the instructions of the court, and the argument of counsel, and after deliberation returned into court the following verdict, to-wit:

"We the jury find for the plaintiff, and assess the damages at fourteen thousand dollars.

H. B. HALE, *Foreman.*"

209 It is therefore considered ordered and adjudged that the plaintiff Jonathan Neal as administrator of the estate of George W. Taylor, deceased, have and recover of the defendant St. Louis Iron Mountain and Southern Railway Company the sum of Fourteen Thousand Dollars, his damages, and all of his costs herein laid out and expended, and that execution may issue therefor.

And afterwards at the same term, to-wit: on the 2nd day of July, 1904, the following proceedings were had:

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Defendant.

Defendant Files Motion for New Trial. Motion Overruled.

On this day comes the defendant and files his motion for a new trial herein, the court being advised doth overrule said motion, to which the defendant excepts, and 90 days is given to prepare and file a bill of exceptions, this order was made July — 1904, and not entered, and is entered now for then.

210 STATE OF ARKANSAS, *County of Crawford:*

I, D. W. Moore, Jr., Clerk of the said County and State aforesaid, do hereby certify that the above and foregoing two hundred and nine pages of typewritten and printed matter is a true and correct copy of the proceedings, of record and not of record, had and done at the trial of the case of Jonathan Neal, administrator of the estate

of George W. Taylor, deceased, *vs.* the St. Louis, Iron Mountain and Southern Railway Company, in the Crawford Circuit Court.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court on this the 26th day of September, 1905.

[Seal of Circuit Court, Crawford Co., Arkansas.]

D. W. MOORE, JR., *Clerk,*
By M. V. HAWKINS,
Deputy Clerk.

211 *Appeal to Supreme Court.*

Defendant prays an appeal to the Supreme Court from the Judgment herein.

OSCAR L. MILES,
General Attorney.

Appeal granted Dec. 16th, 1904.
P. D. ENGLISH, *Clerk.*

Summons & Copy Issued.

Returned and appearance entered on Dec. 31, 1904.

212 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the supreme court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of November A. D. 1905, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 30th day of April, 1906, a day of said term:

Submission.

No. 5860.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Appellant,
v.
JONATHAN NEAL, Adm'r, Appellee.

Appeal from Crawford Circuit Court.

This cause being regularly called come the parties by their respective attorneys and said cause is submitted to the court upon the transcript of the record and the briefs filed, and is by the Court taken under advisement.

213 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day being the fourth Monday of May, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 24th day of September, 1906, a day of said term:

Revivor by Agreement.

5860.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant,

v.

JONATHAN NEAL, Administrator of the Estate of Geo. W. Taylor, Deceased, Appellee.

Appeal from Crawford Circuit Court.

On this day the death of the appellee Jonathan Neal is suggested to the court, and conceded by the appellant; it is also conceded that May Taylor was, by the Probate Court of Crawford County, Arkansas, on the 11th day of August, 1906, granted letters of administration upon the estate of said Geo. W. Taylor, deceased, in *in* succession to the said Jonathan Neal deceased. It is agreed by and between counsel for appellant and appellee that this cause may be revived in the name of said May Taylor as administratrix in succession of the estate of Geo. W. Taylor, deceased.

Being sufficiently advised, it is ordered by the court that this cause be and it is hereby, as to the appellee herein, revived in the name of May Taylor, as administratrix in succession of the estate of Geo. W. Taylor, deceased, and that as so revived the same proceed to final judgment, under the submission of this cause heretofore entered.

214 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day being the fourth Monday of May, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 15th day of October, 1906, a day of said term:

Judgment.

5860.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant,
v.
MAY TAYLOR, Administratrix in Succession of the Estate of Geo. W. Taylor, Deceased, Appellee.

Appeal from Crawford Circuit Court.

This cause came on to be heard upon the transcript of the record of the circuit court of Crawford County, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all her costs in this court in this cause expended and have execution thereof.

214*a* No. 69.

In the Supreme Court of Arkansas, March 14, 1903.

NEAL, Adm'r
v.
ST. L., I. M. & SO. RY. CO.

Statement.

RIDDICK, *J.:*

George W. Taylor was employed by the St. Louis, Iron Mountain and Southern Railway Company as a brakeman on one of its freight trains. On the 18th of January, 1899, the train upon which he worked left Van Buren, Arkansas, for Coffeyville, Kansas. The train reached Sallisaw, Indian Territory, about four o'clock in the afternoon and had two cars to be left at that point. For the purpose of putting these cars on the sidetrack the train was uncoupled and the engine with fourteen or fifteen cars attached was run about half a mile farther west leaving the caboose and six cars standing on the main line. After the two cars that were to be left at Sallisaw were put on the side track the twelve or thirteen cars which were attached to the engine were pulled out on the main track and then pushed or kicked back towards the caboose and cars that had been left on the main track. The conductor of the train mounted the front or last car that was being pushed back in order by the use of the brakes to govern the speed of the train. This car upon which the conductor

stood was equipped with the old fashioned link and pin draw bar. It had a capacity of forty thousand pounds and was loaded with shingles which weighed some twenty-three or twenty-four thousand pounds.

The car fartherest to the west of those cars attached to the caboose and to which the car on which the conductor rode was to be coupled had a capacity of sixty thousand pounds, and was loaded with lumber the weight of which was about equal to the capacity of the car. This car was equipped with an automatic coupler but the draw head was fixed so that the link and pin coupler could be used when it was necessary to couple to a car having that coupling. Before these cars came together Taylor went between them and inserted the link in the drawhead of the car having the automatic coupler. When the cars were nearly together he endeavored to get from between
214*b* the cars and was caught between the grab iron and the car and was killed.

Jonathan Neal was appointed administrator of the estate and brought this action against the railway company to recover damages, alleging that the company was guilty of negligence in that the draw head on the cars were not of the standard and uniform height required by an act of Congress, and that the injury was caused by this breach of duty on the part of the company.

The defendant answered and denied the charge of negligence and denied that it had in any respect failed to comply with the act of Congress mentioned.

After hearing the evidence on the part of the plaintiff the circuit court held that the plaintiff had failed to make out a case and directed a verdict and judgment for the defendant. Plaintiff appealed.

Opinion.

This is an action against a railway company to recover damages caused by the death of George Taylor one of its employees. The plaintiff is the administrator of the estate of Taylor and he alleges that Taylor's death was occasioned by the failure of the company while engaged in interstate commerce to provide its cars with drawbars of uniform and standard heights as required by an act of congress. The circuit court after hearing the evidence on the trial held that plaintiff had failed to make out a case and directed a verdict for the defendant. The question before us is whether the evidence was sufficient to require that the case be submitted to the jury for its decision.

The practice of directing a verdict for the defendant when it is clear that the evidence is not sufficient to make out a case for plaintiff is a wise one for it saves time and costs and expedites the business of the court, but a case should not be withdrawn from the jury in that way unless it can be said as a matter of law that no recovery can be had upon any reasonable view of the facts which the evidence tends to establish. Catlett *v.* St. L. I. M. & So. Ry. Co. 57 Ark.

527; Texas Ry. Co. *v.* Cox, 145 U. S. 593; 6 Enc. Plead. & Prac. 679, 680.

214c In order to determine whether it was proper to direct a verdict in this case we must notice the facts which the evidence tends to establish and also the law bearing on the same.

The act of congress upon which plaintiff bases his right of action was passed for the protection of employees of railroad companies engaged in interstate commerce and for other purposes. It provides that "the standard height of drawbars for freight cars measured from the level of the tops of the rails to the center of the draw bars for standard gauge railroads in the United States shall be 34½ inches, and the maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars shall be three inches." (Acts of Congress, Mar. 2, 1893.)

Now the conductor of the train upon which Taylor was an employee testified that as the two cars which Taylor was endeavoring to couple, came together the witness who was standing on one of the cars noticed that the drawhead of the car having the common drawbar was from two to three inches higher than the drawbar of the other car having the automatic coupling. He further stated that the face of a common drawbar is only five or six inches in width while that of the automatic drawbar is eight inches in width, and it follows that if the centers of these drawbars had been even the top of the common drawbar would have been an inch or inch and a half lower than the top of the automatic. As this testimony tended to show that instead of being lower the top of the common drawbar was from two to three inches higher than the top of the automatic, it also follows that this evidence tended to show that at the time of this accident there was a difference between the centers of the drawbars of the two cars which Taylor was trying to couple of from three to four inches. The automatic drawbar was the lower of the two and the witness stated that Taylor put the link in the automatic drawbar and endeavored to raise it high enough to enter the drawhead of the other car which was approaching, that it seemed that he could not get it high enough and that for this reason he dropped it and undertook to get from between the cars. The common drawbar struck on top of the link in the automatic drawbar slid along

214d it and striking the knuckles on the automatic drawhead broke it off and then passed along the top of the automatic drawbar so that the two cars came together catching Taylor between the grab irons and causing his death. It seems to us that under this state of the evidence it was a question for the jury to say whether there was a failure on the part of the company to comply with the act of Congress requiring companies engaged in interstate commerce to use cars with drawbars of standard and uniform heights, and whether this failure to comply with the statute was the cause of Taylor's death. The evidence may not be very satisfactory, for it is doubtful whether the conductor while on the top of the car could tell accurately the slight difference between the drawbars as they came suddenly together, but the weight of such evidence is a matter for the jury to determine and not the court

Counsel for appellant contend that there is no evidence to show that the centers of the draft line of the drawheads of these two cars were not even, and therefore no evidence to show that the variation in the draft line of the two cars was more than that permitted by the act of Congress. But the act of Congress does not require that the draft line of cars used in interstate commerce should be even but requires that the centers of the drawbars should be of the standard and uniform height mentioned in the act. The act says nothing about draft line but requires that the centers of the drawbars should be of uniform height with the exception that a variation is permitted between loaded and unloaded cars. For this reason the failure to show what the variation was between the centers of the draft line of the drawbars on these two cars was not mentioned.

Again counsel for appellant contends that if it be admitted that the drawbars were defective, still there is no evidence that the defendant had notice of the defect and that on that ground plaintiff failed to make out his case. It is true that as a general rule the master is only bound to use ordinary care to provide suitable and safe machinery for the servant and is liable for damages caused by defective machinery only when the defect is the result of negligence on his part, as when he neglected to repair the defect after having notice of the same or when by the use of ordinary care he would have known that the machinery or appliances were defective. In such cases the plaintiff must show knowledge of the defect on the part of the master or that its lack of knowledge was due to negligence, for the mere fact of an injury caused by a defect does not of itself make out a case of negligence. But it is different when the injury is caused by a violation of a statutory duty on the part of the master. The statute upon *when* this case is based does not say that the company shall use ordinary care to provide its cars with drawbars of a certain height but it imposes as a positive duty upon railway companies that they shall do so. Where it is shown that the company has violated this statutory duty that fact of itself makes out if not a case of negligence *per se* at least a *prima facie* case of negligence sufficient to go to the jury if it be also shown that the injury was caused by this failure of the company. 3 Elliott on Railroads, sec. 1155; Dressler Employers' Liability, sec. 51.

214c

It must of course be shown that the failure of the company to comply with the statutory requirement was the proximate cause of the injury or that it contributed to the injury. If in this case the proximate cause of the injury was the great and unusual force with which the cars were pushed or kicked back against the other cars, then if that was caused by the act of a fellow servant plaintiff could not recover. But this carelessness of a fellow servant would not prevent a recovery if the failure of the master to furnish the kind of drawbars required by the statute also contributed to the injury. The contributory negligence of the plaintiff or the party injured is usually a good defense but the fact that the negligence of a third person contributed with that of the master to cause the injury is no defense, for in such a case each of the wrong doers is responsible for the entire injury. The plaintiff cannot have but one recovery but in

such a case he has the option to sue either or both of the parties that caused his injury. Chicago etc. Ry. Co. *v.* Chambers, 68 Fed. 148.

The act of congress requiring railroad companies to equip their cars with drawbars of standard and uniform heights specially provides that an employee injured by the failure of a company
214*f* to comply with the act shall not be deemed to have assumed the risk by reason of his knowledge that the company had not complied with the statute and there is no question of assumed risk presented.

After consideration of the law and the evidence in this case we are of the opinion that the circuit court erred in directing a verdict for defendant, the judgment is therefore reversed and a new trial ordered.

215 No. 182.

In the Supreme Court of Arkansas, Oct. 15, 1906.

ST. L., I. M. & SO. RY. CO.
v.
NEAL, Adm'r.

Opinion.

HILL, *C. J.:*

Mr. Justice Battle prepared the statement of facts and opinion of the court, and his opinion reflected at the time it was prepared the views of a majority of the court.

In all matters except the construction of Instruction No. 1 and the refusal to give Instructions 28 & 29 asked by appellant, it expresses the unanimous opinion of the court upon the questions therein discussed, and his statement of facts and opinion, filed herein as a dissenting opinion, is adopted by the court except as to the instructions referred to.

Mr. Justice McCulloch and I take this view of the instructions:

The first paragraph of instruction No. 1 states the rule announced in the former opinion of this case with clearness. Following this correct statement is the second paragraph putting the same proposition in another way, and in that statement there is an error, but not a misleading one. In further explanation the court said: "Now, the law required that the two cars between which Taylor lost his life should be, when unloaded, of the equal and uniform height from the level of the face of the rails to the center of the drawbars of 34½ inches, and when loaded to the full capacity should be of the uniform height of 31½ inches." If this had read of not less than 31½ inches, or if this explanatory paragraph had been omitted there could have been no doubt whatever of the entire correctness of the instruction. But read in connection with the foregoing paragraph, which so plainly and clearly stated the rule, it is difficult to see where this could have misled the jury or been prejudicial. Especially is this the case as the subsequent instructions proceeded on the rect

theory that it was the excessive difference which was actionable.

216 The 28th and 29th instructions requested by appellant simply repeated what the court told the jury in this instruction, and it cannot be error to refuse what was already given. If these instructions had cleared up the inaccuracy in the second paragraph of instruction No. 1, then it would have been error to have refused them, but they merely repeated the substance of the first and third paragraphs of this instruction, and these paragraphs needed no repetition or explanation, as they are complete of themselves.

Mr. Justice Wood and Mr. Justice Riddick do not in all things agree with the foregoing opinion, but they do concur in the judgments for reasons which will be stated by them. Therefore a majority of the court is in favor of affirmance and the judgment stands affirmed.

Mr. Justice Battle dissenting.

217 No. 202.

In the Supreme Court of Arkansas, Oct. 15, 1906.

ST. L., I. M. & SO. RY. CO.
v.
NEAL, Adm'r.

Dissenting Opinion.

BATTLE, *J.*:

The St. Louis, Iron Mountain and Southern Railway Company owned and operated a railway, which was engaged in inter-State commerce, and extended from the city of Van Buren, in this State, through the Indian Territory, to the city of Coffeyville, in this State, of Kansas. The town of Sallisaw, in the Indian Territory, is on its line of railway. George W. Taylor was employed by it as a brakeman on one of its freight trains. On the 18th of January, 1899, this train left Van Buren for Coffeyville. It had two cars to be left at Sallisaw. When it reached that place the train was uncoupled for the purpose of leaving these cars on the side track, and the engine, with several cars attached, moved forward, leaving the caboose and other cars standing on the main line. The two cars that were to be left were placed on the side track, and the cars attached to the engine were pushed or kicked back towards the caboose and cars left on the main line. The front car of those pushed or kicked back on the main track, it being first in line in the direction they were moving, was equipped with "the old fashioned link and pin drawbar." It was moved back for the purpose of attaching it to the cars left with the caboose. The car to which it was to be coupled was equipped with an automatic coupler, but its drawhead was so made "that the link and pin coupler could be used when it was necessary to couple to a car having that coupling." As the cars to be coupled were coming together Taylor stepped between them, and inserted a link in the drawhead of the automatic coupler. The cars approaching

came with great force, and when they were near the car to which they were to be linked, he endeavored to get from between them, but was caught and killed.

Jonathan Neal was appointed administrator of the estate of
218 the deceased; qualified as such; and brought this action against the Railway Company for the damages to his widow and next of kin caused by his death, alleging that it was the result of the negligence of the defendant in failing to have the drawbars on the cars that he attempted to couple "of even, uniform or standard height, as required by the laws of Congress." The defendant answered and denied that its negligence contributed to the death of plaintiff's intestate; and alleged that it was caused by his own negligence.

The issues in the action were tried by a jury in the Crawford Circuit Court; the defendant recovered a judgment; plaintiff appealed to this court; the judgment was reversed, and the cause was remanded for a new trial. Neal *v.* St. Louis, Iron Mountain & Southern Railway Co. 71 Ark. 445.

Upon a second trial in the Circuit Court the plaintiff recovered a judgment for $14,000; and the defendant appealed.

The law of Congress on which this action is based is section five of an act of Congress entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March 2, 1893, which is as follows: "That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroad in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars.

* * * * * * *

And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

219 Within the time designated by the act the American Railway Association filed with the Interstate Commerce Commission the certificate of their designation, which, in part, is as follows: "Resolved, that the standard height of draw-bars for freight cars, measured perpendicular from the level of the tops of the rails to the center of drawbars, for standard gauge railroads in the United States, shall be thirty-four and one-half inches and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be three inches."

In the second trial Earl Witt, a brakeman, testified that he saw the cars the deceased attempted to couple, after the accident, and that the automatic coupler appeared to be about three or four inches lower

than the other; and that to determine this difference he made no close inspection or measurement. Charles Lattin, another brakeman, testified that he examined them and one appeared to be one, one and a half, or two inches higher than the other, and one two inches thicker than the other. He says: "When the cars came together I noticed these two drawbars, the best I could see, passed each other kind of to the side and over the top. In the automatic coupler there is an opening that is called a jaw; space in there that fastens in the knuckle. The drawbar appeared to go in this opening of the automatic coupler." Again he says: "A brakeman handed me the link (the link with which the deceased attempted to couple the cars) I found one drawhead broken off; one part of the automatic coupler was broken off. The knuckle on the automatic coupler was broken off. There was a scratch or two on the automatic drawhead; I think the jaw had scratched on it; on the side of the corner. The link had a bright place on the top of it; a bright mark on the link. The link was twelve or fourteen inches in length. The bright spot on the link was on the side of it; on the flat side of the link; on top is all I noticed; it was on the flat side of the link. Both prongs of the link were bright." He testified that one car was loaded to its full capacity and that the other had a light load. W. H. Mc-
220 Pherson and M. D. Sanders, car inspectors testified that they examined the cars, a very short time after the accident, while they were standing on the track, and measured the height of the drawbar in each car, at the ends where the same came together in the collision, from the centers of the drawbars to the top of the rail, and found that the height of one was 32½ inches, and of the other 33½ inches, a difference of one inch.

The evidence tended to show that Taylor attempted to couple the cars, and failing to do so, to get from between them before they collided, and was caught and killed. Witnesses present testified that the moving car was traveling at a speed they variously estimated from three to eight miles an hour.

Defendant offered to prove by many witnesses, who saw Taylor going between the cars to make the coupling, that they impulsively cried out when they saw him and made expressions like these, "Watch that man, he will be killed if he goes in there," "those cars are going to hit like hell and if that fellow goes in there he will get killed," "that brakeman will be killed if he goes in there."

The court instructed the jury over the objections of the defendant as follows:

1. "The Act of Congress fixes the standard height of loaded cars engaged in inter-state commerce on standard gauge railroads at 31½ inches and unloaded cars at 34½ inches measured perpendicularly from the level of the face of the rails to the centers of the draw-bars and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now, the law required that the two cars between which Taylor lost his life should be when unloaded of the equal and uniform height from the level of the face of the rails to the center of

the draw-bars of thirty-four and one-half inches and when loaded to
the full capacity should be of the uniform height of thirty-one
221 and one-half inches. Now, if the plaintiff by a preponder-
ance of the evidence shows a violation of this duty on the part
of the defendant, then this is negligence and if the proof by a pre-
ponderance also shows that this caused or contributed to the death
of Taylor then you should find for the plaintiff unless it appears by a preponderance of the evidence that Taylor was wanting in ordinary care for his own safety and that this want of care on Taylor's part for his own safety caused or contributed to the injury and death sued for, in which latter case you should find for the defendant."

"2. If there was the difference between the height of the center of the draw-bars in the two cars in question as indicated in the first instruction then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for. On that point if such difference existed and but for its existence the injury and death of Taylor would not have happened then such difference is said in law to be an efficient proximate cause of Taylor's injury and death, although it may be true that other causes may have co-operated with this one in producing the injury and death of Taylor and but for these other co-operating causes the injury and death of Taylor would not have ensued. But if such difference in height of the center of the draw-bars as aforesaid actually existed yet if the injury and death of Taylor would have ensued just the same as it did without the existence of such difference in height of the center of the draw-bars then such difference in the height of the center of the draw-bars is not in law an efficient proximate cause of the injury and death of Taylor."

The court refused to instruct the jury at the request of the defendant as follows:

"28. The court charges you that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centers of the draw-bars of such cars, without regard to the amount of the weight in the partially loaded car."

222 Defendant asked for instructions as to contributory negligence of the plaintiff, if any, which were covered by instructions given by the court, and for that reason were properly refused.

Many instructions were asked by the defendant, which were properly refused for reasons that appear in the opinoin delivered in this case when it was here the first time. Neal *v.* St. Louis, Iron Mountain and Southern Railway Company, 71 Ark. 445.

The evidence offered by the appellant, which the court refused to admit, were predictions of bystanders which were fully verified, as shown by the evidence. Their evidence could not have added any greater probative force to the verification.

Appellant insists that there is no law or act of Congress requiring railroads engaged in the carriage of interstate traffic to provide their cars with draw-bars of standard height, and fixing a maximum variation from such standard height to be allowed between the draw-bars of empty and loaded cars. The reason given for this contention is,

that Congress had no power to delegate to the American Railway Association the authority to legislate. But no such power was given to the American Railway Association. The act vested it with authority to designate the standard height of draw-bars and the maximum variation from such standard height, and when designated in the manner provided by law provides no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with such standard. The authority to designate is given, without the power to give the designation the force or effect of a law. That is derived entirely from the act. When the designation is made the authority was exhausted. No power to change, amend, enforce, or control exists. The American Railway Association from first to last is without any legislative authority whatever. Such legislation has been frequently sustained by the courts. Chicago & Northwestern R. Co. *v.* Day & others, Railroad Commissioners, 1 L. R. A. 741; McWhorter *v.* Pensacola & A. R. Co. 2 L. R. A. 504; State *v.* Chicago, M. & St. P. R. R. Co. 38 Minn. 281; Dastervignes *v.* U. S. 122 Fed. 223 Rep. 30; Boyd *v.* Bryant, 35 Ark. 69.

Was the instruction given over the objections of the appellant correct? It says, "The act of Congress fixes the standard height of loaded cars engaged in interstate commerce at 31½ inches and unloaded cars at 34½ inches measured perpendicularly from the level of the face of the rails to the centers of the draw-bars and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty." This is not true. It fixes the standard height of draw-bars for freight cars, "measured perpendicularly from the level of the tops of the rails to the center of draw-bars, for standard gauge railroads, at 34½ inches, and the maximum variation from such standard height to be allowed between the draw-bars of empty and loaded cars" at three inches. The standard height of the draw-bars of loaded freight cars is not fixed by the act, but "the standard height of draw-bars for freight cars" and the maximum variation from such height to be allowed between the draw-bars of empty and loaded cars are fixed. The height of draw-bars for loaded cars may be greater than 31½ inches, but not less. This was held to be the meaning of the act when this case was first here on appeal. This court said: "We do not think it would be practicable to so construct cars that the distance between the centers of the draw-bars should vary in exact proportion to the difference in their loads. It may be practicable to construct them so that when empty the centers of their draw-bars will be 34½ inches above the top of the rail, and that when one is loaded and another is empty or only in part loaded, the variation between the centers of their draw-bars will not exceed three inches. And, though the language used is not very clear, we think that this is all the law requires."

After declaring the law as stated the court proceeded to apply it to this case in the instruction as follows: "Now, the law required that the two cars between which Taylor lost his life should be 224 when unloaded of the equal and uniform height from the level of the face of the rails to the center of the draw-bars

of thirty four and one half inches and when loaded to the full capacity should be of the uniform height of thirty one and one half inches. Now if the plaintiff by a preponderance of the evidence shows a violation of this duty on part of defendant, then this is negligence," &c. The question submitted by this instruction to the jury was, was the height of the centers of the draw-bars of the two cars, when unloaded, 34½ inches, and when loaded to the full capacity, 31½ inches? It said nothing about the duty of the jury as to the height of the center of the draw-bar of the car partly loaded, but refused to instruct them in that respect at the request of the appellant, as it should have done, as follows: "The court charges you that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centers of the draw-bars of such cars, without regard to the amount of weight in the partially loaded car."

It has been suggested that so much of the second instruction to the jury as is as follows, "If there was the difference between the height of the center of the draw-bars in the two cars in question as indicated in the first instruction then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for," cures the defect in the first. But it does not. The difference referred to in the second instruction is the three inches difference in the heights of loaded and empty cars. That was the only difference submitted by the first instruction to the consideration of the jury. On the contrary the court refused to instruct them as to the difference allowed between the heights of the draw-bars of loaded and partly loaded cars. Having instructed them as to the difference of height of the draw-bars of loaded and empty cars it undertook in the second instruction, to tell them the effect that should be given to their findings upon that subject. If such difference exists it tells them that in a given case it would be an efficient proximate cause of the injury and death of Taylor, while in
225 another case it would not be.

The evidence as to the issues in this case is unsatisfactory. To have avoided prejudice the instructions to the jury should have been accurate, clear and unambiguous. The instructions we have considered do not meet this requirement and were prejudicial.

Reverse and remand for a new trial.

226 STATE OF ARKANSAS:

In the Supreme Court of Arkansas.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of May, A. D. 19[illegible]6, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 29th day of October, 1906, a day of said term:

Petition for Rehearing.

5860.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant,
v.
MAY TAYLOR, Adm'r in Succession Est. Geo. W. Taylor, Deceased, Appellee.

Appeal from Crawford Circuit Court.

Comes the appellant by attorney and files its petition for rehearing, which petition is by the court taken under advisement.

227 No. 5860.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant,
vs.
JONATHAN NEAL, Administrator, Appellee.

Petition for Rehearing.

Comes the appellant in the above entitled cause, the St. Louis, Iron Mountain and Southern Railway Company, and prays the court to set aside the judgment in this cause rendered on the 15th day of October, 1906, and grant it a re-hearing in said cause for the following reasons, to-wit:

First. The court erred in holding that the Circuit Court of Crawford County had jurisdiction of this cause.

Second. The court erred in holding that this cause should not have been removed to the United States Court, sitting at Ft. Smith, Arkansas, on the petition of appellant, as set out in the record in this case.

Third. The court erred in holding that there was sufficient testimony in this case upon which to base a recovery against the appellant.

Fourth. The court erred in holding the testimony of B. M. James, Ed. Johnson, S. C. Rossin, Charles Frye and W. D. Alford to be incompetent, and, hence, properly excluded by the trial court.

Fifth. The court erred in holding that the trial court properly excluded the statement of M. D. Sanders made to G. W. Reeves at the moment the cars were coming together between which the deceased, George W. Taylor, lost his life.

Sixth. The court erred in holding that the trial court properly excluded the testimony of J. M. Walsh offered in response to certain questions set out in the record.

228 Seventh. The court erred in holding that there was in force an Act of the Congress of the United States establishing the uniform and standard height of draw-bars.

Eighth. The court erred in holding that the testimony of Joe Curtice was competent to be considered by the jury in this cause.

Ninth. The court erred in holding that the remarks of the attorney for the appellee in his closing argument were proper and non-prejudicial to the appellant.

Tenth. The court erred in holding that charge number 1, given by the trial court, was proper and non-prejudicial to the appellant.

Eleventh. The court erred in holding that this cause was transitory, and that although the accident which gave rise to the cause of action occurred in the Indian Territory, yet that suit to recover upon such cause of action might be maintained in the State Courts of the State of Arkansas.

Twelfth. The court erred in holding that the trial court properly refused instruction number 12, asked for by appellant.

Thirteenth. The court erred in holding that the trial court properly refused instruction number 17, asked for by appellant.

Fourteenth. The court erred in holding that the trial court properly refused instruction number 22, asked for by appellant.

Fifteenth. The court erred in holding that the trial court properly refused instruction number 30, asked for by appellant.

Sixteenth. The court erred in holding that the trial court properly defined the variation between the height of draw-bars established by the Act of Congress.

Seventeenth. The court erred in holding that the Railway Company was not entitled to reasonable opportunity to ascertain whether or not the draw-bars were of uniform and standard height, after it was shown by the record that the Company constructed these cars originally so that the draw-bars were of uniform and stand-
229 ard height, and had made adequate preparation for the maintenance of such uniform and standard height.

Eighteenth. The court erred in holding that the trial court properly refused an instruction, asked for by the appellant, which told the jury that by center of draw bar was meant the center of the draft line, or center of the draw-bar shank.

Nineteenth. The court erred in holding that the testimony in this case was sufficient to justify a recovery against the appellant.

Twentieth. The court erred in holding that the trial court properly refused instruction number 26.

Twenty-first. The court erred in holding that the trial court properly refused instruction number 27.

Twenty-second. The court erred in holding that the trial court properly refused instruction number 28.

Twenty-third. The court erred in holding that the trial court properly refused instruction number 29.

Twenty-fourth. The court erred in holding that the trial court properly refused instruction number 23.

Twenty-fifth. The court erred in holding that the trial court properly refused the instruction of the appellant which in effect asked the court to instruct that there was no comity between the State of Arkansas and the Indian Territory, and that this cause of

action could not be tried in the State of Arkansas as a transitory action.

Twenty-sixth. The court erred in holding that the trial court properly refused instruction number 17.

I, Oscar L. Miles, counsel for appellant in the above entitled cause, do certify that the petition for re-hearing in this case is not prayed for petulantly nor to gain time, but in order that the appellant may have a full and impartial hearing of all the questions which it carefully raised and preserved in the trial court in this cause to the end that its cause may be fully and properly litigated, and its rights carefully preserved.

OSCAR L. MILES,
Attorney for Appellant.

230 Endorsed on Back: St. L. I. M. & So. Ry. Co. *vs.* Jonathan Neal, Administrator. Petition for Re-hearing. Served. Filed October 24, 1906. P. D. English, Clerk. By W. P. Sadler, D. C.

231 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of May, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 12th day of November, 1906, a day of said term:

Petition for Rehearing Submitted.

5860.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant,
v.
MAY TAYLOR, Administratrix in Succession of the Estate of Geo. W. Taylor, Deceased, Appellee.

Appeal from Crawford Circuit Court.

The appellant, by its attorney, having filed its briefs in support of the petition for rehearing, this cause is now submitted upon the said petition and the briefs filed, and is by the court taken under advisement.

232 STATE OF ARKANSAS:

In the Supreme Court.

Be it remember-, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of May, A. D. 1906, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 19th day of November, 1906, a day of said term:

Petition Denied.

5860.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant,
v.
MAY TAYLOR, Adm'r'x Est. of Geo. W. Taylor, Deceased, Appellee.

Appeal from Crawford Circuit Court.

Being fully advised the petition for rehearing filed in this cause is by the Court denied.

233 No. 257.

In the Supreme Court of Arkansas, Nov. 19, 1906.

ST. L., I. M. & SO. RY. CO.
v.
NEAL, Adm'r.

Opinion on Rehearing.

HILL, *C. J.*:

1. Appellant calls attention to the matter of jurisdiction heretofore urged, which was fully considered by the court, but not mentioned in the opinion.

The suit was brought in Crawford circuit court and on petition of defendant was removed to United States Circuit Court for the Western District of Arkansas, and a motion to remand to the State court was sustained by said United States Circuit Court.

The rule governing this matter is thus stated by the United States Supreme Court: "If the circuit court (of the United States) remands a cause and the State court thereupon proceeds to final judgment, the action of the circuit court is not reviewable on writ of error to such judgment. A State court cannot be held to have decided against a Federal right, when it is the Circuit Court (of the United States), and not the State court, which has denied its possession. * * * As under the statute a remanding order of the circuit court is not reviewable by that court on appeal or writ of error

from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a State court, the prohibition being that 'no appeal or writ of error from the decision of a circuit court remanding such cause shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under Sec. 709 in respect of such an order when the state court has rendered no decision against a Federal right but simply accepted the conclusion of the circuit court." Missouri Pacific Ry. *v.* Fitzgerald, 160 U. S. 556; Nelson *v.* Maloney, 174 U. S. 164; Telluride Power Trans. Co. *v.* R. G. W. Ry. 182 U. S. 569.

In view of the foregoing decisive settlement of the matter the court did not consider that it was a question properly for its
234 decision and expressed no opinion on the right of removal and expresses none now.

Attention is called to the fact that there was a second petition for removal which the State court denied. If there had been any change in the removable nature of the suit after the cause was remanded then a question addressing itself primarily to the State circuit court would have been presented and its decision reviewable here and the decision of this court reviewable on writ of error by the Supreme Court of the United States, but such was not the case.

The original complaint alleged: "That plaintiff's cause of action arises under an Act of Congress, and in the trial of said cause there will be a controversy as to the construction of said Act of Congress," and it then proceeded to allege the death of the deceased "on account of said wrongful and improper equipment of said two cars (which he as brakeman was coupling), and the negligent, defective and dangerous condition of same, that said cars were wrongfully and improperly equipped, and in a dangerous and defective condition in this: said cars were not equipped with automatic or safety couplers, the drawbars on said cars were not even, uniform or standard height, as required by the laws of Congress." After the remand of the cause to the State circuit court the plaintiff amended the first clause above quoted so as to make it read as follows: "That plaintiff's cause of action arises under an Act of Congress, and in the trial of said cause there will be a controversy as to the construction of said act of Congress, and that in the trial of this cause said act of Congress will have to be construed by the court, and that there will be a controversy as to the construction of said act of Congress."

Appellant says: "After the cause was remanded from the United States court at Fort Smith to the Crawford circuit court for trial, then the plaintiff amended his complaint, and charged that his cause of action arose under the *safety appliance act of Congress*, and that it would be necessary for the court to construe the *safety ap-*
235 *pliance act of Congress* during the further progress of the cause." All of this is true, but the complaint before amendment showed exactly the same thing and the amendment was trival and neither added to nor took away anything. Whether it was a Federal question was just as clearly in the complaint before as it was

after the amendment, and the Federal circuit court decided it was not a Federal question and that decision is not reviewable here.

When an amendment transforms a non removable case into a removable one then the defendant may have and sustain a second petition for removal. Moon on Removal of Cause, sec. 157; Powers *v.* C. & O. Ry. 169 U. S. 92.

But, as indicated, this case fall- far away from that rule.

2. It is contended that the court erred in holding the facts sufficient to sustain the verdict. The facts on the former trial are set out in 71 Ark. 445, and the facts in the last trial, and there were some differences, are set out in the separate opinion of Mr. Justice Battle, and it would be useless to review them now. The court is satisfied they are sufficient to sustain the verdict, and while there is a difference of opinion among the judges as to the instructions, there is no difference on this question.

3. It is insisted that the former decision is not binding as *res judicata* on this appeal; as to the facts where they are not identical, that is true; but the law governing the construction of the act of Congress is invoked on the facts formerly presented and on the facts as now presented, and the former construction is the law of this case and cannot be reopened on this appeal. All matters heretofore and now presented have been considered and the motion is denied.

236 STATE OF ARKANSAS:

In the Supreme Court.

I, Peyton D. English, Clerk of the supreme court of the State of Arkansas, hereby certify that the foregoing 235 pages contain a full, true, and complete transcript of the record and proceedings in said court in the cause therein stated with all things concerning the same.

In testimony whereof I hereto set my hand as clerk and affix the seal of said court, at my office, in Little Rock, Arkansas this 20th day of December, A. D. 1906.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH, *Clerk.*

237 Copy.

In the Supreme Court of the State of Arkansas.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
v.
MARY TAYLOR, Administratrix in Succession of the Estate of George W. Taylor, Deceased, Defendant in Error.

Assignment of Errors & Prayer for Reversal.

Oscar L. Miles, Attorney for Plaintiff in Error.

Filed December 1, 1906.

P. D. ENGLISH, *Clerk*,
By W. P. SADLER, *D. C.*

238 In the Supreme Court of the State of Arkansas.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
v.
JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Defendant in Error.

Assignment of Errors.

Now comes the said plaintiff in error and respectfully submits that in the record, decision and final judgment of the Supreme Court of the State of Arkansas in the above entitled matter, there is manifest error in this, to-wit:

First. The Court erred in upholding the action of the trial court in taking jurisdiction of this cause after the same had been remanded from the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division, to which the same had been carried on plaintiff's first petition for removal.

239 Second. The Court erred in upholding the action of the Crawford Circuit Court in refusing to transfer this cause to the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division, on the plaintiff's second petition for removal.

Third. The Court erred in upholding the action of the Crawford Circuit Court in refusing to direct a verdict for the defendant on plaintiff in error's motion on the ground that comity does not move between State and Federal Courts, and that, though a cause of action may be transferred between State Courts, there can be no such thing as transitory jurisdiction between State and Federal Courts:—it appearing from the record that the cause of action herein sought to be recovered upon arose in the Indian Territory, where only existed

United States Courts; that the plaintiff in the court below was a citizen of the state of Arkansas and had qualified as administrator in the state of Arkansas.

Fourth. The Court erred in upholding the action of the Crawford Circuit Court in refusing to dismiss this cause on the various motions of the plaintiff in error that said cause was in law and in fact pending in the United States Court at Ft. Smith, Arkansas.

Fifth. The Court erred in upholding the action of the trial court in its refusal on motion of the defendant to direct a verdict in favor of the defendant for the reason that the testimony in the
240 cause, taken in its strongest probative sense most favorable to the plaintiff, was insufficient to support a verdict against the defendant under the Act of Congress of March 2, 1893.

Sixth. The Court erred in upholding the action of the trial court in refusing to direct a verdict in favor of the defendant for the reason that, as it was alleged, the Congress of the United States had passed no law requiring a uniform and standard height of draw bars on cars engaged in interstate commerce, the only regulation on that subject being made upon the suggestion of the American Railway Association and at the request of the Interstate Commerce Commission, which in legal effect constituted at most only a rule or regulation of the Interstate Commerce Commission.

Seventh. The Court erred in upholding the instructions, and each paragraph thereof, given by the trial court of its own motion as being correct and as presenting a proper construction of the Act of Congress of March 2, 1893.

Eighth. The Court erred in upholding the action of the trial court in refusing to give instruction No. 12, asked for by the defendant, as follows:

"12. You are instructed that at the time Brakeman Taylor was killed, defendant owed no duty to said Taylor to have all its cars equipped with automatic couplers, an Act of Congress requiring such automatic couplers not at that time being in force."

241 Ninth. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 17, asked for by the defendant, as follows:

"17. Before you can find for the plaintiff in this action you must find that there was more than three inches difference in the perpendicular height of the shanks of the draw-heads in the two cars that came together and crushed Taylor, measured from the top of the rail to a horizontal line drawn through the middle of each shank of each draw-head; and, further, you must find, if there was such difference, that the difference was due to the improper original construction of the cars, and not due to ordinary wear or incidental breakage of any of the supports in said cars which would affect said heights of said draw bars."

Tenth. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 18, asked for by the defendant, as follows:

"18. If you find from the evidence in this case that the accident

which resulted in the death of Brakeman Taylor occurred in the Indian Territory, and that J. Neal, administrator, resides in the State of Arkansas, and was appointed administrator under the laws of the State of Arkansas, and has brought this action in the State of Arkansas, then the court tells you that he cannot maintain said action, and you should find for the defendant."

242 Eleventh. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 19, asked for by the defendant, as follows:

"19. If you find from the evidence in this case that by a statute of the State of Arkansas conductors having superintendence or control over trainmen are not fellow servants with the brakemen and other trainmen, but are vice-principals, and that no such statute is in force in the Indian Territory, and that the death for which damages are claimed in this action occurred in the Indian Territory, then this action cannot be maintained in the State of Arkansas by reason of the dissimilarity of the statutes in the two Jurisdictions."

Twelfth. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 20, asked for by the defendant, as follows:

"20. If you find from the evidence in this cause that the death of Brakeman George W. Taylor was caused by an accident in the Indian Territory, and that this suit for damages on account of such death is brought in the State of Arkansas, and that in the State of Arkansas, there is a statute which makes all the railway employees in different departments, although in the service of the same company, employed by the same company, paid by the same company, and laboring to a common purpose, not fellow servants but vice-principals to each other, and that no such statute exists in

243 the Indian Territory, then this action cannot be maintained in the State of Arkansas by reason of the dissimilarity of the laws of the two jurisdictions touching the same subject matter."

Thirteenth. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 21, asked for by the defendant, as follows:

"21. If you find from the evidence that by reason of the law of the State of Arkansas persons who having been killed or injured by the reason of the negligence of a railroad company, and who having obtained judgment for such negligent injury or killing, have a lien upon the road bed and franchise of such railroad to secure the collection of such judgment and that no such law as this is in force in the Indian Territory, then this action cannot be maintained in the State of Arkansas, and you should find for the defendant."

Fourteen .. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 22, asked for by the defendant, as follows:

"22. If you find from the evidence in this cause that, although a draw bar may be adjusted to the standard height when the car is first built and turned out of the shop, that the every day wear and tear of the car continually lower the draw-bar that the defendant in order to provide against the lowering of the draw bar, provides an

ample supply of shims ready to the hands of the trainmen
244 and car inspectors which may be readily and in a very short time placed under the draw bars so as to restore them to uniform and standard height, then the court tells you that the master has fully performed his duty, and if there was any failure of the trainmen, switching crew or car inspectors to use these shims so provided, such failure was the failure of a fellow servant with the deceased and you should find for the defendant."

Fifteenth. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 23, asked for by the defendant, as follows:

"23. The court tells you that if you find from the evidence in this case the defendant equipped all of its cars with uniform and standard height draw bars when such cars were first built and turned out of the shops, then the defendant is only bound to use ordinary care to maintain such draw bars at the uniform and standard height spoken of in the testimony."

Sixteenth. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 24, asked for by the defendant, as follows:

"24. By the center of the draw bar is meant the center of the draw bar shank, or the center of the draft line of the draw bar."

Seventeenth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 25, asked for by the defendant, as follows:

245 "25. By standard height is meant from thirty-one and one-half inches to thirty-four and one-half inches measured perpendicularly from the face of the rail to the center of the draft line in the draw bar."

Eighteenth. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 26, asked for by the defendant, as follows:

"26. Cars are of uniform and standard heights when the centers of the draw bar shanks are not less than thirty-one and one-half inches nor more than thirty-four and one-half inches, measured perpendicularly, above the face of the rail."

Nineteenth. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 27, asked for by the defendant, as follows:

"27. The court charges you that the Act of Congress allows a variation in height of three inches between the centers of the draw bars of all cars used in inter-state commerce, the measurement of such height to be made perpendicularly from the top of the rail to the center of the draw bar shank or draft line."

Twentieth. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 28, asked for by the defendant, as follows:

"28. The court charges you that when one car is fully
246 loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between

the centers of the draw bars of such cars, without regard to the amount of weight in the partially loaded car."

Twenty-first. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 29, asked for by the defendant, as follows:

"29. Before the plaintiff can recover in this case, he must show by a preponderance of the testimony that there was more than three inches difference in the height between the centers of the draft lines in the draw bars in the cars between which Taylor lost his life, and that such difference if it existed was the proximate or producing cause of his death, or that it contributed along with other causes, aside from the deceased's own conduct, to produce such death."

Twenty-second. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 30, asked for by the defendant, as follows:

"30. Before you can find for the plaintiff you must find that there was a difference of more than the law allowed between the draw bars at the time the cars came together, and that such difference was the proximate cause of the death of Taylor."

Twenty-third. The Court erred in upholding the action of the trial court in its refusal to give instruction No. 31, asked for by the defendant, as follows:

247 "31. In view of the closing argument made by counsel for the plaintiff in the regard to the difference in heights of draw bars allowed by law, defendant asks the court to charge the jury, that if they find that there was only one inch difference in the heights of the centers of the draw bars in the ends of the cars which came together and killed George Taylor, this difference will not justify you in finding in favor of the plaintiff in this case."

Twenty-fourth. The Court erred in upholding the action of the trial court in excluding the testimony of witness J. M. Walsh offered by the defendant.

Twenty-fifth. The Court erred in upholding the action of the trial court in excluding the testimony of certain witnesses as to matters of *res gestae* and spontaneous declarations, occurring simultaneously with the accident and death of Geo. W. Taylor.

Twenty-sixth. The Court erred in upholding the action of the trial court in refusing to exclude the testimony of witness Joe Curtice.

Twenty-seventh. The Court erred in upholding the action of the trial court in refusing to exclude that part of the testimony of witness Joe Curtice with reference to the difficulty of coupling a car involved in this controversy to another car not involved in this controversy on the evening of the accident.

248 Twenty-eighth. The Court erred in holding that the verdict of the jury in this case was supported by the law as embodied in the Act of the Congress of the United States.

Twenty-ninth. The Court erred in holding that the verdict of the jury in this case was supported by sufficient testimony under the Act of Congress of the United States.

Thirtieth. The Court erred in ordering judgment to be entered against this defendant.

Thirty-first. The Court erred in holding that the plaintiff in this case in the court below was entitled to recover under the act of Congress of March 2, 1893.

Because of the foregoing errors it is asked that the judgment in this case be reversed.

Respectfully submitted,

OSCAR L. MILES,
Attorney for Plaintiff in Error.

249 Original.

In the Supreme Court of Arkansas.

No. —.

MAY TAYLOR, Administrator in Succession of the Estate of George W. Taylor, Deceased, Plaintiff,
v.
THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

To the Honorable Jos. M. Hill, Chief Justice of Supreme —, Arkansas:

St. Louis, Iron Mountain & Southern Railway Company, By ——, Attorney.

Filed December 1st 1906.

P. D. ENGLISH, *Clerk*,
By W. P. SADLER, *D. C.*

250 In the Supreme Court of Arkansas.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,
v.
THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

Epitome of the Record.

To the Honorable Jos. M. Hill, Chief Justice of the Supreme Court, Arkansas:

Your petitioner, the St. Louis, Iron Mountain & Southern Railway Company, a railroad corporation, organized under the laws of the States of Missouri and Arkansas, respectfully shows:

251 That heretofore, towit, at the June term, 1899, there was called for trial in the Crawford County Circuit Court, of the

State of Arkansas, a case in which Jonathan Neal, as administrator of the estate of George W. Taylor, deceased, was plaintiff and your petitioner was defendant.

The complaint of plaintiff in said cause prayed for the recovery of damages for the alleged wrongful killing of the plaintiff's intestate. Said complaint alleged that the defendant, your petitioner, maintained and equipped two of its freight cars in one of its west-bound freight trains, engaged in interstate commerce, in so negligent, wrongful, improper, and unsafe condition that the plaintiff's intestate, while engaged in the duties of brakeman for the defendant and while attempting to make a coupling between two of the cars in said freight train, was caught between the said cars, mashed and instantly killed on account of the wrongful and improper equipment of said two cars, that said two cars were wrongfully equipped and in a dangerous condition for the reason that they were not equipped with automatic and safety couplers, and that the drawbars on said two cars were not of even, uniform and standard height as required by the laws of the Congress of the United States.

To this complaint, your petitioner, the St. Louis, Iron Mountain & Southern Railway Company, made answer, denying the various averments of plaintiff's complaint and alleging that it had
252 complied with the laws of the Congress of the United States of America in the equipment of its said cars, alleging the gross contributory negligence of the deceased, George W. Taylor, in that he went between the cars and attempted to effect a coupling at a time when the train was moving at a high and dangerous rate of speed and at a time when there was no necessity for the said Taylor so to do.

Said cause coming on for hearing at the June term of the aforesaid Crawford Circuit Court, your petitioner, the St. Louis, Iron Mountain & Southern Railway Company, filed a petition and bond for removal of the cause to the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division, in the words and figures which follow, towit:

"Crawford Circuit Court, State of Arkansas, June Term, 1899.

"JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

v.

"THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

"Petition for the Removal of this Cause to the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division.

253 "To the Honorable the Circuit Court of Crawford County, State of Arkansas:

"Your petitioner, the St. Louis, Iron Mountain & Southern Railway Company, respectfully shows that it is the defendant in the

above entitled suit, and that the matter and amount in dispute in said suit exceed, exclusive of the interest and cost, the sum or value of $2,000.00.

"That your petitioner was, at the time of bringing this suit, and still is, a citizen of the State of Arkansas, and that said plaintiff was then, and still is, a citizen of the State of Arkansas.

"That said suit is of a civil nature, and was instituted by the plaintiff against the defendant for the purpose of recovering damages for the alleged negligent killing of plaintiff's decedent by the alleged negligent movement of one of defendant's trains in the Indian Territory, in the United States of America.

"That said suit is one arising under the laws of the United State in this, towit: That prior to the passage, by the Congress of the United States, of an Act placing in force in the Indian Territory certain statutes of the State of Arkansas, no action would lie for death by wrongful act in the Indian Territory; and that, if the plaintiff is entitled to maintain his cause of action in this behalf, he is entitled to maintain said cause of action solely by reason of the passage of the aforesaid Act of Congress, placing in force
254 in the Indian Territory Chapter 119 of Mansfield's Digest of the Statutes of the State of Arkansas.

"And your petitioner further alleges that the aforesaid Act of Congress of the United States is not a general law of Congress, applicable alike to all the States, but is a special law and only locally applicable to the Indian Territory; that plaintiff's cause of action arises under, and has its origin in this said Act of Congress; and that at the trial of said cause of action, it will be necessary to construe this said Act of Congress, in order to properly determine the relative rights of the plaintiff and the defendant in this suit.

"And your petitioner offers herewith bond, with good and sufficient surety, for its entering in said Court of the United States, on the first day of the next session a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

"And your petitioner prays this Honorable Court to proceed no further herein, except to make an order for the removal of this cause to the said Circuit Court of the United States, and to accept said surety and bond, and cause the record herein to be removed into said Circuit Court of the United States, Ft. Smith Division, and it will ever pray.

"OSCAR L. MILES,
"Attorney for Petitioner."

255 COUNTY OF CRAWFORD:

"I, Oscar L. Miles, do solemnly swear that I am attorney for petitioner in the above entitled cause and that I have read the foregoing petition and know the contents thereof, and the statements and allegations contained therein are true, as I verily believe.

(Signed) "OSCAR L. MILES."

"Subscribed to by the said Oscar L. Miles in my presence and by him sworn to before me this 27th day of June, 1899.

(Signed) "PALMER DANAHER,
Notary Public.

"My commission expires Oct. 3, 1902."

In the Crawford Circuit Court, June Term, 1899.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,
v.
THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Bond for Removal of Cause.

Know all men by these presents: That the St. Louis, Iron Mountain & Southern Railway Company, as principal, and Oscar
256 L. Miles and George R. Wood, as sureties, are held and firmly bound unto the plaintiff, Jonathan Neal, as administrator, in the penal sum of one thousand dollars for the payment whereof well and truly to me made unto said Jonathan Neal as administrator, and unto his successors, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: Said St. Louis, Iron Mountain & Southern Railway Company having petitioned the Circuit Court of Crawford County, Arkansas, for the removal of a certain cause, therein pending, wherein Jonathan Neal, as administrator of the estate of George W. Taylor, deceased, is plaintiff, and the St. Louis, Iron Mountain & Southern Railway Company is defendant, to the Circuit Court of the United States in and for the Western District of Arkansas, Fort Smith Division;

Now if the said St. Louis, Iron Mountain & Southern Railway Company, your petitioner, shall enter in said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs which may be awarded by said Circuit Court of the United States, and if said Court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and virtue.

Witness our hands and seals this 19th day of June, A. D., 1899.

257 (Signed) ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
By OSCAR L. MILES, *Attorney.*
OSCAR L. MILES.
GEORGE R. WOOD.

Above petition and bond endorsed on back hereof: "Filed October 22, 1900. W. P. Sadler, Clerk. By F. R. Galloway, D. C."

And the said Crawford Circuit Court, having said petition and bond for removal under advisement and finding the same in all respects regular and in compliance with the law in such cases made and provided, directed that this cause be transferred to the United States Circuit Court for the Western District of Arkansas, Fort Smith Divison, and the same was accordingly done.

After such cause was filed in the said United States court, the plaintiff by his attorney filed in said court a motion to remand the same to the Crawford Circuit Court, whence it was removed.

And the said United States Court having said motion under advisement, ordered that the same be remanded to the Crawford
258 Circuit Court, in the county of Crawford, of the State of Arkansas, for trial which was duly done.

At the November term, 1899, of the said Crawford Circuit Court, the above entitled cause coming on to be heard, the defendant, your petitioner, moved said Crawford Circuit Court to dismiss this cause from its docket for the reason that the same was in law and in fact pending in the United States Court for the Western District of Arkansas, Fort Smith Division, and the court overruled the same to which action, the defendant, your petitioner, saved its exceptions.

Thereupon the plaintiff asked leave of the court to amend his complaint by interlineation as follows:

"That plaintiff's cause of action arises under an Act of Congress and in the trial of said cause, there will be a controversy as to the construction of said Act of Congress."

And immediately after said complaint was thus amended by the plaintiff and with the consent of the court, the defendant filed its second petition and bond for the removal of the cause to the United States Circuit Court for the Western District of Arkansas, Fort Smith Division, said petition and bond being in the words and figures following, towit:

259 Crawford Circuit Court, November Term, 1899, State of Arkansas.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

v.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Petition for Removal of This Cause to the United States Circuit Court for the Western District of Arkansas, Fort Smith Division.

To the Honorable the Circuit Court of Crawford County, State of Arkansas:

Your petitioner, the St. Louis, Iron Mountain & Southern Railway Company, respectfully shows that it is the defendant in the above entitled suit, and that the matter and amount in dispute in said suit exceed, exclusive of the interest and costs, the sum or value of $2,000.00.

That said petitioner was at the time of bringing this suit, and still is, a citizen of the State of Arkansas, and that said plaintiff was then, and still is, a citizen of the State of Arkansas.

That said suit is of a civil nature, and was instituted by the plaintiff against the defendant for the purpose of recovering damages for the alleged negligent killing of plaintiff's decedent by the
260 alleged negligent movement of on- of defendant's trains in the Indian Territory, in the United States of America.

That said suit is one arising under the laws of the United States, in this, towit: That prior to the passage by the Congress of the United States of an act placing in force in the Indian Territory certain statutes of the State of Arkansas, no action would lie for death by wrongful act in the Indian Territory; and that if plaintiff is entitled to maintain his cause of action in this behalf, he is entitled to maintain said cause of action solely by reason of the passage of the aforesaid Act of Congress, placing in force in the Indian Territory, Chapter 119 of Mansfield's Digest of the Statutes of the State of Arkansas.

And your petitioner further alleges that the aforesaid Act of Congress of the United States is not a general law of Congress applicable alike to all the States, but is a special law, and applicable locally only to the Indian Teritory. That plaintiff's cause of action arises under and has its origin in this said Act of Congress, and that at the trial of said cause of action, if plaintiff shall be able to recover, it will be by reason of the construction placed upon this Act of Congress; and at the trial of this cause of action, it will be necessary to construe this Act of Congress in order to properly determine the relative rights of the plaintiff and the defendant in this suit.

And your petitioner further shows that, subsequent to the filing of its former petition and bond for removal of this cause to
261 the United States Circuit Court for the Western District of Arkansas, Fort Smith Division, plaintiff amended his complaint, thereby alleging negligence upon the part of the defendant in that defendant had not complied with certain laws of Congress, requiring defendant's cars to be equipped with automatic or safety couplers. Your petitioner would show that it is a common carrier, engaged in interstate commerce, and was such at the time of the injuries alleged in plaintiff's complaint, and that the aforesaid laws of Congress, and those hereinafter referred to, are applicable to your petitioner. Your petitioner would show that at the trial of this cause it will be necessary to construe a certain Act of Congress of March 2, 1893, requiring railroads to equip their cars with automatic and safety couplers; it will be necessary to construe the action of the Interstate Commerce Commission, taken on December 23, 1893, whereby the time for the equipment of the defendant's cars with automatic and safety couplers was alleged to have been extended; it will be necessary for the court to determine whether or not the defendant under the terms and provisions of this Federal law, and the action of the Interstate Commerce Commission, a Federal creation, deriving all of its authority from Federal law, was negligent as alleged in plaintiff's complaint.

Your petitioner asks that the amended complaint of plaintiff, to-

gether with the answer of defendant filed herein, be taken, made and considerd as a part of this petition.

262 And your petitioner offers herewith bond, with good and sufficient surety, for its entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs which may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further, herein, except to make an order for the removal of this cause to the said Circuit Court of the United States, and to accept said surety and bond, and cause the record herein to be removed into said Circuit Court of the United States in and for the Western District of Arkansas, Fort Smith Division, and it will ever pray.

OSCAR L. MILES,
Attorney for Petitioner.

STATE OF ARKANSAS, *County of Crawford:*

I, Oscar L. Miles, do solemnly swear that I am attorney for the petitioner in the above entitled cause, and that I have read the foregoing petition and know the contents thereof, and the statements and allegations therein contained are true, as I verily believe.

OSCAR L. MILES.

Subscribed by the said Oscar L. Miles in my presence and by him sworn to before me this — day of ——, 1899.

263 Crawford Circuit Court, November Term, 1899.

JONATHAN NEAL, Administrator of the Estate of George W. Taylor, Deceased, Plaintiff,

v.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Defendant.

Bond for Removal.

Know all Men by these Presents:

The St. Louis, Iron Mountain & Southern Railway Company, as principal, and Oscar L. Miles and George R. Wood, sureties, are held and firmly bound unto the plaintiff, Jonathan Neal, as administrator, in the penal sum of $1,000.00 for the payment whereof well and truly to be made unto said Jonathan Neal, as administrator, and unto his successors, we bind ourselves, our heirs, representatives, and assigns jointly and severally firmly by these presents.

Yet, upon these conditions: That said St. Louis, Iron Mountain & Southern Railway Company, having petitioned the Circuit Court of Crawford County, State of Arkansas, for the removal of a certain cause therein pending, wherein Jonathan Neal, as administrator of

the estate of George W. Taylor, deceased, is plaintiff, and the
264 St. Louis, Iron Mountain & Southern Railway Company is defendant, to the Circuit Court of the United States, in and for the Western District of Arkansas, Fort Smith Division.

Now, if the said St. Louis, Iron Mountain & Southern Railway Company, your petitioner, shall enter in said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs which may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, to remain in full force and virtue.

Witness our hands and seals this 22d day of November, A. D., 1899.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
By OSCAR L. MILES, *Attorney.*
OSCAR L. MILES.
GEORGE R. WOOD.

Endorsed on back: "Filed October 22, 1900. W. P. Sadler, Clerk, By J. R. Galloway, D. C."

And the said Crawford Circuit Court, having said petition and bond for removal under advisement, did overrule the same
265 and to the action of the Court in this regard, the defendant saved its exceptions.

Thereafter, the above entitled cause coming on to be heard before the Honorable J. H. Evans, Judge, presiding, and a jury empanelled to try the issues joined, and after hearing the testimony in the cause on behalf of the plaintiff, the court on motion of the defendant and at the close of the plaintiff's testimony, directed the jury to return a verdict for the defendant on the ground that the testimony, taken in its strongest probative sense most favorable to the plaintiff, would not justify the jury in returning a verdict against the defendant. The plaintiff filed his motion for a new trial, which was overruled, and the plaintiff prayed an appeal to the Supreme Court of the State of Arkansas. Said cause was in said Supreme Court heard and a judgment was entered, reversing said cause and remanding same to the Crawford Circuit Court for a new trial.

Said cause coming on to be heard a second time in the Crawford Circuit Court, at the June Term, 1904, the defendant filed its motion to dismiss said cause from the docket for the reason that said cause was and is only triable in the United States Court for the
266 Western District of Arkansas, Fort Smith Division. The Crawford Circuit Court overruled said motion and the defendant saved its exceptions.

On the 25th day of June, 1904, said cause coming on to be heard before the Hon. J. H. Evans and a jury empannelled therein, the plaintiff in order to maintain the issues on his part introduced, among other evidence, the following:

C. R. DOBSON (Tr. p. 146), who testified that he was a carpenter engaged in the building of cars, that he worked for the St. Louis, Iron Mountain & Southern Railway Company, at St. Louis, and at De Soto, Missouri; that he was familiar with the construction of freight cars and the manner in which the drawbars were attached to them and explained in detail how the same were constructed and how the said drawbars were attached to the draft timbers. (Tr. p. 147.) He also explained with great minuteness and in detail the manner in which the cars were built and the drawbars made to conform to standard height. (Tr. p. 147.) He also explained how the height of the drawbar might be ascertained, even though one end of it was broken off and the draft timber greatly damaged. (Tr. p. 147.) He explained that all of the cars when they were originally constructed were built to a uniform and standard gauge, that all of the draw-bars were of uniform and standard height, that when they were first constructed, they were sent over an inspection track and carefully
267 and finally inspected by the last and final inspector. (Tr. p. 149.) He explained in great detail how the uniform and standard height in drawbars might be affected and destroyed by the ordinary wear of the car and explained what provision the Company had made to maintain a uniform and standard height of couplers while the cars were moving over the road from division point to division point where the Company's car inspectors were stationed and maintained. (Tr. p. 150.)

Also introduced C. A. BOSSHARDT (Tr. p. 135), who testified that he was a car carpenter, engaged in the construction of cars at Little Rock, Arkansas, that he was Division Foreman of the Car Department. This witness explained the construction of the cars, how they were built to a standard gauge and how the drawbars were made to comply with the Act of Congress in relation to being of uniform and standard height. (Tr. pp. 136, 137.) He testified that Iron Mountain car No. 11962 and Missouri Pacific car No. 12224 (Theses being the two cars between which the accident occurred in which Taylor lost his life) were built in the same series of cars of 1891. (Tr. p. 139.) He gave in detail the method in which the uniform and standard height of drawbars would be affected by the ordinary wear and tear of cars in the transportation service and what provision the Company had made to maintain a uniform and standard height of drawbars while the cars were moving over the road between points where the Company's inspectors were maintained. He ex-
268 plained that this series of cars when they were originally constructed were built to the same standard and gauge so completely and perfectly that two of the cars might be taken to pieces and the timbers interchanged and the two cars reconstructed without cutting a timber or boring a hole, and that the drawbars were invariably of uniform and standard height when first turned out and that the drawbars of one car might be taken out and interchanged with the drawbars of another car. (Tr. p. 144.)

W. H. McPHERSON, witness for the defendant, testified as follows: On the evening of the day on which the deceased, George Taylor, lost his life, he (McPherson) was at that time car inspector of the St. Louis, Iron Mountain & Southern Railway Company, at Van Buren, Arkansas; were sent to Sallisaw, Indian Territory, where the accident occurred, to inspect the cars and to note if possible any defects; that he went there immediately, arriving about three hours after the accident; that the cars between which George Taylor was killed were yet standing on the track and that he made a very careful examination, inspection and measurement of said cars; that, amongst other things, he measured the exact distance of the center of the draft line in the drawheads above the top of the rail and found that in Missouri Pacific Car, No. 12224, the drawbar was thirty-three and one-half inches
from the top of the rail to the center of the draft line, and the
269 center of the draft line was the center of the drawbar; that the drawbar in St. Louis, Iron Mountain & Southern Railway Car No. 11962 was, by actual measurement from the top of the rail to the center of the draft line of said drawbar, thirty-two and one-half inches, and that the center of the draft line was the center of the drawbar, thereby showing the difference in variation of one inch between the centers of the draft line of said drawbars, when measured perpendicularly from the top of the rail on which said cars were standing.

M. D. SANDERS, witness for the defendant, testified as follows: That at the time of the accident in which George Taylor lost his life at Sallisaw, Indian Territory, M. D. Sanders was joint car inspector for the Kansas City Southern Railway and the St. Louis, Iron Mountain & Southern Railway Company, at the station of Sallisaw aforesaid; that he was called upon to examine, inspect and measure the two cars in the collision between which the said George Taylor lost his life; that he made such examination, inspection and measurement within a very few minutes after Taylor was killed; that he measured the height of the drawbar in each car at the ends where the same came together in the collision, from the top of the rail on which the cars were standing to the center of the draft line, and the centers of the draft line, were the centers of the drawbar; that he found Missouri Pacific Car No. 12224 to be thirty-three and one-half inches from the top of the rail to the center of the draft line in its drawbar; and that the drawbar in Iron Mountain Car No. 11962 was
270 thirty-two and one-half inches from the top of the rail to the center of the draft line, measured perpendicularly from said rail, and that there was a difference of just one inch between the centers of the draft line of the two drawbars in which the cars came together when the same were measured perpendicularly above the top of the rail.

Witnesses, LATTIN, WITT, BOSSHARDT and DOBSON, all testified that, in railroad parlance, by the center of the drawbar is meant the center of the drawbar shank or the draft line drawn through the center of the drawbar shank.

The following are the proceedings of the Interstate Commerce Commission and the American Railway Association:

Proceedings of the Interstate Commerce Commission and American Railway Association.

Notice to Common Carriers of the Standard Height of Drawbars.

At a General Session of the Interstate Commerce Commission, held at its office in the City of Washington, D. C., on the sixth day of June, A. D. 1893.

271 Present: Hon. William R. Morrison, Chairman; Hon. Wheelock G. Veazy, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements, Commissioners.

Whereas, by the fifth section of an Act of Congress approved March 2, 1893, entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," it is provided, among other things, "That within ninety days from the passage of this Act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers,

272 owners or lessees engaged in interstate commerce in the United States by such means as the commission may deem proper." * * * "And after July First, Eighteen Hundred and Ninety-five, no cars, either loaded or unloaded shall be used in interstate traffic which do not comply with the standard above provided for."

And Whereas, the said American Railway Association did thereafter, and within the period of ninety days after the passage of said act, towit: on the 26th day of May, 1893, duly file with the Interstate Commerce Commission the certificate of their action, designation and determination in manner and form as follows, viz.:

The American Railway Association.

OFFICE OF THE SECRETARY, 24 PARK PLACE,
NEW YORK, *May* 22, 1893.

To the Honorable The Interstate Commerce Commission, Washington, D. C.:

In compliance with the fifth section of an Act of Congress approved March 2nd, 1893, entitled "An Act to promote the safety of

employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes; and their locomotives with driving-wheel brakes, and for other purposes."

273 The American Railway Association hereby certifies to your honorable body, that at its regular meeting held at Chicago, on April 12, 1893, it adopted resolutions, as follows:

Resolved, that the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the center of drawbars, for standard gauge railroads in the United States, shall be thirty-four and one-half inches and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be three inches;

Resolved, that the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for the narrow-gauged railroads in the United States, shall be twenty-six inches, and that the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be three inches.

Witness:

THE AMERICAN RAILWAY ASSOCIATION.
H. S. HAINES, *President.*
W. F. ALLEN, *Secretary.*

Now, therefore, in pursuance of the provisions of said section five of said act.

It is ordered, that notice be at once given to all common carriers, owners, or lessees engaged in interstate commerce in the United States, that the standard height of drawbars for freight cars

274 measured perpendicular from the level of the tops of the rails to the centers of the drawbars, has been designated and determined by the American Railway Association, mentioned in said Act, as and to be thirty-four and one-half inches for standard gauged railroads in the United States, and twenty-six inches for narrow-gauged railroads in the United States; that the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars both for standard and narrow-gauged railroads in the United States has been fixed and determined by said Association at three inches; and that such determination has been duly certified by said Association to the Interstate Commerce Commission.

EDW. A. MOSELY, *Secretary.*

After both parties had announced their case closed, the defendant, your petitioner, moved the court to direct a verdict in favor of your petitioner, as Congress had passed no law requiring railroads engaged in interstate commerce to equip their cars with couplers of uniform and standard height.

This motion of the defendant was overruled and the defendant saved its exceptions.

275 Thereupon the court instructed the jury of its own motion as follows:

1. The act of Congress fixes the standard heights of loaded cars engaged in interstate commerce on standard-gauge railroads at thirty-one and one-half inches and unloaded cars at thirty-four and one-half inches measured perpendicularly from the face of the rails to the centers of the drawbars and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially or by its being carried in the train when it is empty. Now, the law required that the two cars between which Taylor lost his life should be when unloaded of the equal and uniform height from the level of the face of the rails to the center of the drawbars of thirty-four and one-half inches and when loaded to the full capacity should be of the uniform height of thirty-one and one-half inches. Now, if the plaintiff by a preponderance of the evidence shows a violation of this duty on the part of the defendant, then this is negligence and if the proof by a preponderance also shows that this caused or contributed to the death of Taylor then you should find for the plaintiff unless it appears by a preponderance of the evidence that Taylor was wanting in ordinary care for his own safety and that this want of care on Taylor's part for his own safety caused or contributed to the injury and death sued for, in which latter case you should find for the defendant.

276 2. If there was a difference between the height of the center of the drawbars in the two cars in question as indicated in the first instruction, then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for. On that point, if such difference existed and but for its existence the injury and death of Taylor would not have happened then such difference is said to be in law an efficient proximate cause of Taylor's injury and death, although it may be true that other causes may have co-operated with this one in producing the injury and death of Taylor and but for these other co-operating causes the injury and death of Taylor would not have ensued. But if such difference in height in center of drawbars as aforesaid actually existed, yet if the injury and death of Taylor would have ensued just the same as it did without the existence of such difference in height of the center of drawbars, it is not in law an efficient proximate cause of the injury and death of Taylor.

To the giving of each paragraph of these instructions and also the instructions as a whole, the defendant excepted and saved its exceptions.

The defendant, your petitioner, asked, among other instructions, the following, each one of which was refused by the Court, towit:

12. You are instructed that at the time Brakeman Taylor was killed defendant owed no duty to said Taylor to have all the
277 cars equipped with automatic couplers, an Act of Congress requiring such automatic couplers not at that time being in force.

16. If you find from the evidence in this case that, at the time Brakeman Taylor was killed, there were a number of cars left standing on the main track at the station of Sallisaw, and that ten or twelve

loaded box-cars were being moved down the main track towards the standing cars for the purpose of coupling them together; that said cars were moving at about the rate of four miles per hour, and that while said cars were so moving, said Taylor went in between the moving and standing cars for the purpose of making the coupling, and that said cars came together with such force as to break the drawhead and coupling apparatus and to catch, crush and kill said Taylor, then the action of said Taylor in going between said cars to make said coupling would be the proximate cause of his death, and you should find for the defendant.

17. Before you can find for the plaintiff in this action you must find that there was more than three inches difference in the perpendicular height of the shanks of the drawheads in the two cars that came together and crushed Brakeman Taylor, measured from the top of the rail to a horizontal line drawn through the middle of each shank of each drawhead; and, further, you must find, if there was such difference, that the difference was due to the improper original construction of the cars, and not due to ordinary wear or incidental breakage of any of the supports in said cars which would affect said heights of said drawbars.

278 18. If you find from the evidence in this case that the accident which resulted in the death of Brakeman Taylor occurred in the Indian Territory, and that J. Neal, administrator, resides in the State of Arkansas, and was appointed administrator under the laws of the State of Arkansas, and has brought his action in the State of Arkansas, then the court tells you that he can not maintain said action, and you should find for the defendant.

19. If you find from the evidence in this case that, by a statute of the State of Arkansas, conductors having superintendence or control over trainmen are not fellow-servants with the brakemen and other trainmen, but are vice-principals, and that no such statute is in force in the Indian Territory, and that the death for which damages is claimed in this action occurred in the Indian Territory, then this action can not be maintained in the State of Arkansas by reason of dissimilarity of the statutes in the two jurisdictions.

20. If you find from the evidence in this cause that the death of Brakeman George W. Taylor was caused by an accident in the Indian Territory, and that this suit for damages on account of such death is brought in the State of Arkansas, and that in the State of Arkansas there is a statute which makes all railway employees in different departments, although in the service of the same company, employed by the same company, paid by the same company, and laboring to a common purpose, not fellow-servants, but vice-

279 principals to each other, and that no such statute exists in the Indian Territory, then this action can not be maintained in the State of Arkansas by reason of the dissimilarity of the laws of the two jurisdictions touching the same subject-matter.

21. If you find from the evidence that, by reason of a law of the State of Arkansas, persons who having been injured or killed by reason of the negligence of a railroad company, and who having obtained judgment for such negligent injury or killing, have a lien

upon the road-bed and franchise of such railroad to secure the collection of such judgment and that no such law as this is in force in the Indian Territory, then this action can not be maintained in the State of Arkansas, and you should find for the defendant.

22. If you find from the evidence in this cause that although a drawbar may be adjusted to the standard height when the car is first built and turned out of the shop, that the every-day wear and tear of the car continually lowers the drawbar—that the defendant in order to provide against this constant lowering of the drawbar, provides an ample supply of shims ready to the hands of the trainmen and car inspectors which may be readily and in a very short time placed under the drawbars so as to restore them to uniform and standard height, then the court tells you that the master has fully performed its duty, and if there was any failure of the trainmen, switching crew or car inspectors to use these shims so
280 provided, such failure was the failure of a fellow-servant with the deceased, and you should find for the defendant.

23. The court tells you if you find from the evidence in this case the defendant equipped all of its cars with uniform and standard height drawbars when such cars were first built and turned out of the shops, then the defendant is only bound to use ordinary care to maintain such drawbars at the uniform and standard height spoken of in the testimony.

24. By center of the drawbar is meant the center of the drawbar shank, or the center of the draft-line of the drawbar.

25. By standard height is meant from 31½ inches to 34½ inches measured perpendicularly from the face of the rail to the center of the draft-line in the drawbar.

26. Cars are of uniform and standard heights when the centers of the drawbar shanks are not less than 31½ inches nor more than 34½ inches, measured perpendicularly, above the face of the rail.

27. The court charges you that the Act of Congress allows variations in height of three inches between the centers of the drawbars of all cars used in interstate commerce, regardless of whether they are loaded or empty the measurement of such height to be made perpendicularly from the top of the rail to the center of the drawbar shank or draftline.

281 28. The court charges you that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centers of the drawbars of such cars, without regard to the amount of weight in the partially loaded car.

29. Before the plaintiff can recover in this case he must show by a preponderance of the testimony that there was more than three inches difference in the height between the centers of the draft-lines in the drawbars in the cars between which Taylor lost his life, and that such difference, if it existed, was the proximate or producing cause of his death, or that it contributed along with other causes, aside from deceased's own conduct, to produce such death.

30. Before you can find for the plaintiff you must find that there was a difference of more than the law allowed between the draw-

bars at the time the cars came together, and that such difference was the proximate cause of the death of Taylor.

31. In view of the closing argument made by counsel for plaintiff in regard to the difference in the heights of drawbars allowed by law, defendant asks the court to charge the jury, that if they find that there was only one inch difference in the heights of the centers of the drawbars in the ends of the cars which came together and killed George Taylor, this difference will not justify you in finding in favor of the plaintiff in this case.

To the refusal of the court to so instruct the jury as re-
282 quested by the defendant, the defendant saved its separate and several exceptions.

At the conclusion of said trial, the jury returned a verdict for the plaintiff in the sum of fourteen thousand dollars and the defendant filed its motion for a new trial which was in words and figures as follows, towit:

Comes the defendant, the St. Louis, Iron Mountain & Southern Railway Company, and moves the court to set aside the verdict in this case rendered on the first day of July, 1904, and grant it a new trial for the following reasons, towit:

1. The court had no jurisdiction to try this cause, for the reason that the same is pending in the United States Court, for the Western District of Arkansas, Fort Smith Division.

2. The court erred in refusing to grant defendant's second petition for removal of this cause which was made, filed and presented subsequent to a time when the plaintiff amended his complaint in this cause by interlineation.

3. The court erred in overruling defendant's protest against the jurisdiction of this court, and in denying its motion to dismiss and strike this cause from the docket of this court, filed on the — day of June, 1904.

4. The court erred in admitting, over the objections of
283 the defendant improper testimony of witness, Earle Witt.

5. The court erred in refusing to instruct the jury to return a verdict in favor of the defendant at the close of the plaintiff's testimony.

6. The court erred in excluding the testimony of B. M. James, Ed Johnson, S. C. Rossin, Charles Frye and W. D. Alford, as to exclamations made by them at the time of the occurrence of the accident which was offered as a part of *res gestæ*.

7. The court erred in excluding the statement of M. D. Sanders made to G. W. Reeves at the moment the cars were coming together, which statement defendant maintains was a part of the *res gestæ*.

8. The court erred in refusing to permit witness J. M. Walsh to answer various questions propounded to him by the defendant.

9. The court erred in refusing, on motion of the defendant, to direct the jury to return a verdict in favor of the defendant, for the reason that the Congress of the United States has passed no law requiring the railroads in the United States, engaged in interstate commerce, to equip their cars with couplers of uniform and standard heights, such as spoken of in the testimony in this case.

10. The court erred in overruling defendant's motion to exclude the entire testimony of witness Joe Curtice.

11. The court erred in overruling the motion of defendant
284 to exclude that part of the testimony of witness Joe Curtice with reference to the difficulty of coupling one of the cars involved in this controversy to another car not involved in this controversy on the evening of the accident.

12. The court erred in overruling defendant's objection to the closing argument of S. R. Chew, attorney for the plaintiff, wherein the said Chew argued that link, knuckle and coupler involved in the wreck wherein Taylor lost his life, were not produced in court, there being no testimony that any effort was made to get this material testimony, and that no request had been made by counsel for the plaintiff for the same.

13. The court erred in giving instructions numbers "A," 1, 2, 3, 4, 5, 6, and 7, of its own motion and over the objections of the defendant.

14. The court erred in refusing to give instructions numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 asked for on behalf of the defendant.

15. The verdict of the jury was contrary to the evidence.

16. The verdict of the jury was not supported by sufficient evidence.

17. The verdict of the jury was against the overwhelming weight of the evidence.

18. The verdict of the jury was contrary to the law.

285 19. The verdict of the jury was for an excessive amount, showing that the jury were moved by prejudice, passion and partiality.

The court, having said motion for new trial under advisement, did overrule the same, and to the action of the court in this behalf the defendant saved its exceptions and appealed the case to the Supreme Court of Arkansas.

Federal Questions Presented.

Your petitioner has gone deeply into the record of this case to show that his entire fight through the state courts of the State of Arkansas was based on Federal questions. Your petitioner shows that the heart and core of this case was a Federal question and that your petitioner's entire defense was based upon and revolved around the construction of the two Acts of Congress referred to in your petitioner's second petition to the Crawford Circuit Court for removal to the United States Circuit Court for the Western District of Arkansas, Ft. Smith Division, as set forth above, and your petitioner now specifically shows that Federal questions were raised in the trial of this cause as follows, towit:

First. The original complaint of the plaintiff alleges the
286 death of the plaintiff's intestate in the Indian Territory by reason of the wrongful act of the defendant, your petitioner,

mitted in the Indian Territory. Prior to the passage by the ngress of the United States of the Act which placed in force in Indian Territory certain statutes of the State of Arkansas includ- Lord Campbell's Act, as found in the said statutes of the State of kansas, when the common law was in force in the Indian Terri- y, no action would lie for death by wrongful act in that jurisdic- n. Your petitioner respectfully shows that if plaintiff was en- led to maintain his cause of action in this behalf, he is entitled maintain said cause of action solely by the passage of the afore- d Act of Congress which for the first time allowed a cause of ac- n for loss of life by wrongful act in the Indian Territory.

Second. The defendant, your petitioner, filed its first petition for noval to the United States Court at Ft. Smith and said United ates Circuit Court for the Western District of Arkansas, Fort ith Division, remanded said cause to the Crawford Circuit Court trial. Your petitioner respectfully shows that this was error d is only reviewable by the Supreme Court of the United States.

Third. After the cause was remanded to the Crawford Circuit urt for trial and after the plaintiff had amended his complaint interlineations as follows: "That plaintiff's cause of action arises der an act of Congress and in the trial of said cause there will be ontroversy as to the construction of said Act of Congress," your petitioner immediately filed its second petition and bond for removal, as hereinbefore set out, and the Crawford Circuit Court overruled said petition, and here then arose and is esented a Federal question as to the correctness of that action of Crawford Circuit Court for the determination of this Court.

Fourth. Upon the cause coming on to be heard a second time, ur petitioner filed a motion to dismiss said cause for the reason t the same was in law and in fact pending in the United States rcuit Court at Fort Smith, Arkansas, thus again challenging the risdiction of the Crawford Circuit Court of Arkansas. This mo- n was overruled and now presents a Federal question for this urt to determine as to whether the jurisdiction for the trial of this se was in the Federal or in the State Court.

Fifth. The testimony, as above set out on the part of the defend- t, appertained wholly to the liability of your petitioner under the per construction of the Safety Appliance Act of Congress and the t of Congress creating a liability for death by wrongful act in the dian Territory, and the proper construction of these Acts of the ngress of the United States are wholly Federal in their character d for the construction of this Court.

Sixth. There was a Federal question presented at the trial of this se when your petitioner called upon the Crawford Circuit Court direct a verdict for the defendant because the Congress of the ited States had passed no law requiring uniform and standard heights of drawbars attached to cars engaged in interstate commerce, the only regulation on that subject being one made upon the suggestion of the American Railway Associa- n and at the request of the Interstate Commerce Commission.

Seventh. The instructions of the Crawford Circuit Court given to the jury of its own motion, as hereinbefore set out, were wholly wrong as to the proper construction of the Act of Congress relied upon by the plaintiff as the basis for a recovery in his behalf. Here is presented a question involving the proper construction of a law of Congress which is peculiarly within the jurisdiction of this court.

Eighth. The instructions, as hereinbefore set out as asked for by the defendant and refused by the court, your peittioner alleges set forth the proper construction of the various provisions of the Act of Congress known as the Safety Appliance Act, and under which it is claimed the plaintiff's cause of action arose, said instructions, having been refused by the trial court, present proper questions for the proper determination of this court.

Ninth. Your petitioner respectfully shows to this Court that another Federal question was presented by instruction No. 18, asked for by the defendant and refused by the court, which in effect asked the court to hold that if the testimony showed that the accident, which was claimed gave rise to the cause, occurred in the Indian Territory, that the deceased, George W. Taylor, lived in the State of Arkansas, that the plaintiff, J. Neal, lived in the State of Arkansas and qualified as administrator in the State of Arkansas,
289 that then this cause of action could not be maintained in the State of Arkansas for the reason that comity did not move between the State and Federal courts, that the jurisdiction was peculiarly and exclusively in the United States Court in the Indian Territory.

All these various Federal questions, so decided by the Crawford Circuit Court, were, on appeal to the Supreme Court of the State of Arkansas, finally by said Supreme Court upheld, adopted and declared by said Supreme Court of Arkansas to be in all things correct and not erroneous and prejudicial to this defendant, your petitioner, and said cause was by the Supreme court of Arkansas in all things affirmed on the 15th day of Oct., 1906.

Your petitioner shows that the said judgment of the said Supreme Court of the State of Arkansas was and is a final judgment in the highest court in which a decision in the above entitled cause could or can be had.

Your petitioner further shows that a Federal question was made in said case, towit, as hereinbefore set out, and that said judgment of said Supreme Court was repugnant to and in conflict with the laws of the United States and "the removal acts" of its Congress aforesaid and that said judgment of said Supreme Court was contrary thereto and that a decision of said Federal questions was necessary to the judgment rendered.

290 Wherefore your petitioner presents herewith an exemplified record of the Supreme Court of Arkansas in said cause and prays that a writ of error to said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the statute, in such cases made and provided, said bond and writ of error may

operate a *supersedeas;* that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Supreme Court of Arkansas be reversed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
By OSCAR L. MILES, *Attorney.*

Writ of error allowed December 1, 1906.

JOS. M. HILL,
Chief Justice Supreme Court of Arkansas.

291 Copy of Bond.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
MAY TAYLOR, Adm'x Estate of George W. Taylor, Deceased, Defendant in Error.

Supersedeas Bond.

Know all men by these presents, That we, the St. Louis, Iron Mountain & Southern Railway Company, as principal, and B. S. Johnson, and W. B. Worthen and Geo. W. Rogers and Oscar Davis and Gordon N. Peay as sureties, are held and firmly bound unto May Taylor, Administratrix of the Estate of George Taylor, deceased, in the sum of Twenty Thousand Dollars, to be paid to the said May Taylor, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this first day of December 1906.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error in the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore The condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer judgment interest all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.,
By B. S. JOHNSON, *General Attorney.*
B. S. JOHNSON.
W. B. WORTHEN.
S. W. REYBURN.
OSCAR DAVIS.
GORDON N. PEAY.

292 STATE OF ARKANSAS, *County of Pulaski:*

B. S. Johnson and W. B. Worthen, Gordon N. Peay and Geo. W. Rogers and Oscar Davis being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Arkansas, and know the contents of the foregoing instrument, to which we have attached our names. We each for himself say that we are worth the sum of Five Thousand Dollars, over and above all debts liabilities and exemptions.

B. S. JOHNSON.
W. B. WORTHEN.
GORDON N. PEAY.
S. W. REYBURN.
OSCAR DAVIS.

Subscribed to and sworn to before me this 4th day of December, 1906.

PALMER DANAHER,
[L. S.] *Notary Public for Pulaski County, Arkansas.*

My commission expires June 27, 1908.

Bond approved and to operate as a supersedeas.

JOS. M. HILL,
Chief Justice Supreme Court of Arkansas.

Filed Dec. 4th, 1906.
PEYTON D. ENGLISH, *Clerk.*

293 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Arkansas, before you or some of you, between Mary Taylor Administratrix in succession of the estate of George W. Taylor, deceased, plaintiff, against the St. Louis, Iron Mountain and Southern Railway Company, defendant, a manifest error hath happened, to the great damage of the said The St. Louis, Iron Mountain and Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 3rd day of December, in the year of our Lord one thousand nine hundred and six.

[The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.]

W. P. FEILD,
Clerk of the Circuit Court of the United States, Western Division of the Eastern District of Arkansas.

Allowed by
JOSEPH M. HILL,
Chief Justice of the Supreme Court of the State of Arkansas.

Filed December 3rd 1906.

PEYTON D. ENGLISH, *Clerk.*

294 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Mary Taylor, administratrix in succession of the estate of George W. Taylor, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Supreme Court of the State of Arkansas wherein the St. Louis, Iron Mountain and Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph M. Hill, Chief Justice of the Supreme Court of the State of Arkansas, this 3rd day of December, in the Year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of Arkansas.]

JOSEPH M. HILL,
Chief Justice of the Supreme Court of the State of Arkansas.

VAN BUREN, ARK'S, *Dec. 6th*, 1906.

I, as attorney of record for the defendant in error in the above cause, hereby acknowledge due service of the above citation and enter the appearance of said defendant in error in the Supreme Court of the United States.

SAM. R. CHEW,
Attorney for Defendant in Error.

[Endorsed:] Filed Dec. 6, 1906. P. D. English Clk By J. H. Campbell D. C.

295 STATE OF ARKANSAS:

In the Supreme Court.

I, Peyton D. English Clerk of the supreme court of the State of Arkansas, hereby certify that in obedience to the mandate of the within writ of error a duly certified transcript, under the said seal of said court, of the record and proceedings in the cause therein stated, with all things concerning the same, is hereto attached.

In testimony whereof I hereto set my hand as Clerk of said supreme court and affix the seal of said court, at my office, in the city of Little Rock, this 20th day of December, A. D. 1906.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH, *Clerk.*

Statement of Costs—Supreme Court.

Due appellee printing Briefs	$15.00
Costs in circuit court	20.60
P. D. English Clerk. Transcript & fees on writ of error &c	98.35
	$133.95

[Seal of the Supreme Court of Arkansas.]

Attest:

PEYTON D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 20,530. Arkansas supreme court. Term No. 201. St. Louis, Iron Mountain & Southern Railway Company, plaintiff in error, *vs.* Mary Taylor, administratrix in succession of the estate of George W. Taylor, deceased. Filed January 15th, 1907. File No. 20,530.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, ... *Plaintiff in Error,*

No. 201.

MARY TAYLOR, ADMINISTRATRIX IN SUCCESSION OF THE ESTATE OF GEORGE TAYLOR, DECEASED, ...

..... *Defendant in Error.*

BRIEF IN RESPONSE ON MOTION TO DISMISS.

OSCAR L. MILES,

Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.....*Plaintiff in Error,*

vs. No. 201.

MARY TAYLOR, ADMINISTRATRIX IN SUCCESSION OF THE ESTATE OF GEORGE TAYLOR, DECEASED.....

.....*Defendant in Error.*

BRIEF IN RESPONSE ON MOTION TO DISMISS.

We beg to submit a few thoughts on the motion of the defendant in error to dismiss this cause.

This suit was begun in the Circuit Court of Crawford County, Arkansas, there tried, appealed to the Supreme Court of the State (I refer to the second trial), there affirmed and then brought to this Court on a writ of error.

The material portion of the complaint originally filed in this cause—that portion which sets out fully and clearly the Federal question relied upon to give this Court jurisdiction, is as follows, towit:

(R. page 1.) "That plaintiff's cause of action arises under an Act of Congress, and in the trial of said cause there will be a controversy as to the construction of said Act of Congress..... That said cars were wrongfully and improperly equipped and in a dangerous and defective condition, in this: said cars were not equipped with automatic or safety couplers, the draw bars on said cars were not of even, uniform or standard height, as required by the laws of Congress, 'and that in the trial of this case said Act of Congress will have to be construed by the Court, and that there will be a controversy as to the construction of said Act of Congress.'

"And the draw bars on said cars were faulty, cracked, and in an unsafe and defective condition. That the defendant knew, or by the exercise of ordinary care and diligence could have known of the wrongful, improper and

unsafe equipment of said cars, and the dangerous and defective condition thereof. That each of said cars were at the time loaded, and were engaged in interstate traffic. That on account of said wrongful, improper and unsafe condition of said cars, and the dangerous and defective condition of the same when said cars were pushed together for the purpose of being coupled, one of the drawbars passed over the other and each of said drawbars became cracked and broken, thereby catching plaintiff's intestate between said cars, crushing and killing him as aforesaid."

It is true the plaintiff in error sought to transfer this cause to the United States Circuit Court for the Western District of Arkansas, that such effort failed and that the cause was finally tried in the Circuit Court of Crawford County, Arkansas.

And while said efforts to remove said cause failed, and wrongfully failed, as we maintain, we may well assume, I think, that the remanding of this cause to the Crawford Circuit Court by the aforesaid United States Circuit Court is not reviewable here and now. The jurisdic-

tion of this Court to hear and determine this cause must depend upon the substantial character of the Federal question presented by the pleadings and clearly and fully manifested throughout the entire trial of this cause at *nisi prius,* and at its ultimate hearing in the court of last resort for the State of Arkansas. This Federal question was first set forth by the defendant in error in his original complaint and constantly engaged the attention of the trial and appellate courts at every stage of the proceeding until the cause stood affirmed by the Supreme Court of the State.

In the judgment of the writer, no more important Act of Congress relative to railroads and their management has ever been passed by Congress than the Act approved March 2nd, 1893. This Act was promulgated in the interest of human life, in the interest of the personal safety and security of the great army of railway employees scattered throughout the entire country. The proper interpretation of this Act has often engaged the attention of the best minds of the country. Lawyers and laymen have spent much time and thought in an effort to solve its various provisions. The American Railway Association and the In-

terstate Commerce Commission, both of which were called into consultation prior to its enactment, have subsequent to that time sought to construe its various provisions and this Court, amongst others, has several times sat in solemn judgment upon the meaning of its various clauses and phraseology.

If the construction insisted upon by the plaintiff in error was proper, then the defendant in error should have lost his cause in the Court below. Counsel for the defendant in error, in his brief in support of this motion (pages 23 and 24) seems to urge that this Court can take jurisdiction of a cause coming from a State Court only where the *validity* of an Act of Congress is drawn into question—that when the plaintiff in error concedes the "*validity*" of the Act of Congress, such party cannot invoke the judgment of this Court for the purpose of having that Act properly construed. Certainly this position is untenable. The authorities cited by the attorney for the defendant in error on pages 24, 25 and 26 of his brief fully support this view.

An Act of Congress may be ever so valid and far-reaching in its character and yet, according to the learned counsel for the defendant in error, the Supreme Court of the United States must stand powerless to speak forth its proper interpretation, when a suit under that Act is determined in a State Court. Such a view cannot be upheld. No more important question can ever rise for the determination of this Court, than the proper interpretation of the laws of the Congress of the United States; and whenever there is a controversy as to the proper interpretation of such laws—whenever a party to a suit which has arisen under the laws of Congress asserts a right or claims an immunity, which will be upheld by one interpretation or defeated by another interpretation of a particular Act of Congress, then there is presented a proper Federal question for the determination of this Court.

WHAT IS A FEDERAL QUESTION?

"Three classes of cases are reviewable by the Supreme Court on a writ of error to a State Court:

(1) There must have been drawn in question the validity of a treaty, order or statute or on authority exer-

cised in the United States and the decision must have been against the claim to maintain which either was relied upon;

(2) Or there must have been drawn in question a statute or order, or authority exercised in the State upon the ground of repugnancy to the Constitution or a law or a treaty of the United States, and the decision must have been in favor of the validity of the State law or authority in question;

(3) Or a right must have been claimed under the Constitution or law, or a treaty of or by virtue of commission held or authority exercised by the United States, and the decision must have been against the right so claimed.

"*Home Insurance Company v. Augusta*, 93 U. S. 116."

A case may be considered to arise under the Constitution or a law of the United States whenever its *correct decision* depends upon the construction of either.

"*Cohen v. Virginia*, 6 Wheat. 375."

Or whenever the rights set up by a party may be defeated by the one construction or sustained by the opposite construction.

"*Osborne v. Bank of the United States*, 9 Wheat. 738."

"The right of the Supreme Court to review the final decision of the highest Court of the State extends to cases where any right, title, privilege or immunity is claimed under the Constitution or treaty or statute of, or commission held or authority exercised under the authority of the United States and the decision is adverse. The jurisdiction of the Court under this section is not confined to rights created by the Constitution or a treaty, but extends to rights protected by the Constitution, treaty or laws of the United States from whatever source these arise or may spring.

"*New Orleans v. DeArmas*, 9 Pet. 224."

"Where a party relies upon an Act of Congress and the questions construed by the Court and upon which the

case turned were whether the party had brought himself within the scope of that Act, a Federal question is presented.

"*San Jose Land & Water Company v. San Jose Ranch Company*, 189 U. S. 177."

I think that no good purpose can be served by further citation of authority upon this proposition.

Counsel for the defendant in error did not go far enough in his investigation of the basis for this Court's jurisdiction.

FEDERAL QUESTIONS PRESENTED BY THIS RECORD.

I.

The accident which gave rise to this suit occurred in the Indian Territory. Prior to the passage of the Act of Congress placing in force in the Indian Territory certain portions of Mansfield's Digest of the Statutes of the State of Arkansas, only the common law was in force in the Indian Territory, and under the common law no cause of

action arose for a death by wrongful act. In other words, until the Congress of the United States enacted that certain portions of the law of the State of Arkansas, including in a more or less modified form Lord Campbell's Act, be put in force in that portion of the United States known as the Indian Territory, no suit could be maintained for the loss of a life by negligence, however gross. This Act of Congress was passed prior to the death of Taylor and the institution of this suit. Then certainly this cause of action arose specifically under a law of the Congress of the United States.

When the defendant in error closed his testimony, the plaintiff in error moved the Court to direct a verdict in its favor on the ground that there was no testimony to justify a finding adverse to the plaintiff in error (R. 73). This motion was overruled by the Court and the plaintiff in error saved its exception. This action of the trial court was upheld by the Supreme Court of the State of Arkansas when this cause was affirmed.

This motion for a verdict struck at the very vitals of the right of the defendant in error to recover in this suit.

It challenged the jurisdiction of the Court for the reason that the testimony showed that the accident which gave rise to the cause of action occurred in the Indian Territory and the suit was being maintained in the State of Arkansas. The Congress of the United States had provided courts in the Indian Territory to try causes of action arising there. The defendant in error sought perforce of *comity* to have this cause of action, plainly triable in the Indian Territory, heard and determined in the State of Arkansas. Plaintiff in error urged that comity only moved between sovereigns and a suit for which the original jurisdiction rested with the Federal Court could not perforce of *comity* be maintained in a State Court or *vice versa*.

Instructions Nos. 18, 19, 20 and 21 (R. 125 and 126) were asked for by the plaintiff in error and were refused by the trial Court. These instructions sought to differentiate this trial, which should have occurred in the Indian Territory and in the United States Courts there organized and existing, from the procedure which should properly obtain in the *nisi prius* Courts of the State of Arkansas.

II.

A Federal question was again presented, boldly and clearly when the plaintiff in error moved at the close of all the testimony in the case (R. 110) for a verdict in its favor on the ground that the Congress of the United States had passed a law requiring railroads of the United States engaged in interstate commerce to equip their cars with couplers of uniform and standard height.

THERE IS NO LAW OF THE CONGRESS OF THE UNITED STATES WHICH PRESCRIBES THE UNIFORM AND STANDARD HEIGHT OF DRAW-BARS.

By reference to the Act of the Congress of the United States, familiarly known as the "Safety Appliance Act," approved March 2nd, 1893, it will be noticed that the Congress of the United States specifically provided for, "Power driving-wheel brake and appliances for operating the train-brake system," and for having a sufficient number of cars in each train so equipped "that the engineer on the locomotive drawing such train can control its speed with-

out requiring brakemen to use the common hand-brake "for that purpose;" for cars used in moving interstate traffic to have "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars;" for "secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

But when the Congress undertook to make provisions for the uniform and standard height of draw-bars of cars to be used in interstate traffic, it seemed to have no information on this subject, *and provided that within a given number of days the American Railway Association should designate to the Interstate Commerce Commission what should be the standard height of the draw-bars for such cars, and what should be the maximum variation from such standard height on account of empty and loaded cars.* In other words the Congress of the United States, seeking to proceed under the grant of powers conferred upon it by the Constitution of the United States, and while dealing, not with the local law, not with the enactment of a provision determinable by local option, but while dealing with

the momentous problem of interstate traffic, which problem is co-extensive with the territorial limits of the United States of America, and after it had made specific provisions for a number of things looking to the promotion of the safety of the employes of railroads engaged in interstate commerce, and at a time when it possessed all means adequate to determining what should be the height of draw-bars, paused, so to speak, in the performance of its duty, and undertook to *delegate the determination of this substantative and very vital provision*, first, to the *American Railway Association* and, second, to the *Interstate Commerce Commission*.

We maintain that this procedure upon the part of the Congress of the United States was unwarranted, and from the standpoint of constitutional law, cannot be upheld. The Constitution of the United States conferred upon the Congress the power of regulating commerce between the states. This constituted a specific grant of power to the legislative branch of the Federal Government; and while the Congress of the United States might enact any provision thinkable, tending to regulate, equalize or promote

the facilities of interstate commerce, or the means and agencies by which it was carried on, it cannot, we urge, *delegate the power of enactment* to any association, tribunal or commission of men.

This being true, that portion of the Act of Congress above referred to, which seeks to establish uniform and standard heights of draw-bars, is a nullity and of no binding force or effect upon anyone. When we seek to ascertain the provisions of Congress with respect to automatic couplers, air brakes, train brake system, and grab-irons or hand-holds, we find those provisions plainly set forth in the statutes of the Congress of the United States of America; but when we undertake to ascertain what provision, if any, is made for uniform and standard height of draw-bars, we must look, first, to the statutes of the Congress of the United States; second, to the minutes of the meeting of the American Railway Association; and, third, to the records of the Interstate Commerce Commission to ascertain whether any provision has been made for such uniform and standard height. Can it be said that one of these provisions is more important than another? Will

it be urged that the Congress of the United States could have lawfully delegated this whole subject of "safety appliances," first, to the American Railway Association; and, second, to the Interstate Commerce Commission of the United States? If so, might it not as well delegate every other subject relative to interstate commerce to some specially selected body of men for the initiative; and, second, to the Interstate Commission for final enactment? This species of procedure by the Congress of the United States must not be confused with that other system of legislative enactment whereby it has been held that the Legislature of a State may delegate to the Court the determination of some facts or state of facts upon which a given law may take effect. It must be remembered that this species of procedure at the hands of the State Legislature has never been justified upon any other grounds than the doctrine of *local condition* or *local option;* that it has only been applied where the Legislature sought to create an enactment with respect to local territory, and where it became necessary, or at least desirable, to ascertain the local will.

Here the Congress of the United States was seeking to exercise the power *granted* to it by the Constitution of the United States for the purpose of regulating the great and general subject of interstate commerce; a subject which, as we have above said, was co-extensive with the territorial limits of the United States, not local to one part more than another, but which might well be subject, throughout the entire governmental jurisdiction, to any wholesome legislative provision of the Federal Congress.

Our contention, in brief, is that the Congress of the United States alone has the power to provide for uniform and standard height of draw-bars; that this power was exclusively in the Congress, and could not be delegated to any other association, commission or agency. When it came to making provision for uniform and standard height of draw-bars it was the duty of the Congress to ascertain from any source it desired to use—the American Railway Association—the Interstate Commerce Commission—the Master Car Builder's Association—or any number of those high-intelligenced, long-experienced and conscience-directed railway managers who may be found in any State of

the Union—what that uniform and standard height should be, and then provide by specific enactment for its establishment, just as it did with regard to automatic couplers, air brakes, train brake system, and grab-irons. Having failed to do this, we maintain that this provision has fallen entirely outside the congressional enactment, and is no more enforcible in the Courts than if the subject had never engaged the attention of the Congress at all.

Here then was certainly raised a very important Federal question as to whether or not the very provision upon which the defendant in error founded her cause of action was in fact a valid law of the Congress of the United States.

III.

The first instruction given by the trial Court and finally approved by the Supreme Court of the State of Arkansas presents, we maintain, a very erroneous interpretation of what is meant by uniform and standard height of drawbars. That instruction is as follows:

"The Act of Congress fixes the height of loaded cars engaged in interstate commerce on standard gauge railroads at 31½ inches and unloaded cars at 34½ inches measure perpendicularly from the level of the rails to the centers of the draw-bars and this variation of three inches in height is intended to allow the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now the law required that the two cars between which Taylor lost his life should be when unloaded of equal and uniform height from the level of the face of the rails to the center of the draw-bars of 34½ inches, and when loaded to the full capacity should be of the uniform height of 31½ inches"..... (R. 120). This instruction is clearly erroneous and does not give a proper interpretation of the Act of Congress upon which the defendant in error relied for her recovery.

The plaintiff in error sought to have this instruction modified and the law properly given by requesting the trial Court to charge as follows: (R. 26) "By center of the draw-bar is meant the center of the drawbar shank or the

center of the draft line of the draw-bar." And (R. 27), "By standard height is meant from 31½ inches to 34½ inches measured perpendicularly from the face of the rail to the center of the draft line in the draw-bar." (R. 27.) "Cars are of uniform and standard height when the centers of the draw-bar shanks are no less than 31½ inches or more than 24½ inches measured perpendicularly from the face of the rail." And (R. 27), "The Court charges you that the Act of Congress allows a variation in height of three inches between the centers of the draw-bars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the center of the draw-bar shank or draft line." (R. 28.) "The Court charges you that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centers of the draw-bars of such cars, without regard to the amount of weight in the partially loaded car." And (R. 29), "Before the plaintiff can recover in this case, he must show by a preponderance of the testimony that

there was more than three inches difference in the height between the centers of the draft lines in the drawbars in the cars between which Taylor lost his life, and that such difference if it existed, was the proximate or producing cause of his death; or that it contributed along with other causes aside from the deceased's own conduct to produce such death."

All of these requests by the plaintiff in error for instructions to clearly give a proper interpretation of the Act of Congress relied upon by the defendant in error were refused by the Court, and the plaintiff in error was forced to go to trial before the jury on the interpretation of the law as given by the trial Court in its first instruction, and this action of the trial Court was upheld by the Supreme Court of the State of Arkansas.

The Supreme Court of the State of Arkansas in its first opinion in this case (R. 137), in upholding the instruction of the trial Court as herein set out, said: "Counsel for appellant contend that there is no evidence to show that the centers of the draft lines of the drawheads of

these two cars were not even, and therefore no evidence to show that the variation in the draft line of these two cars was more than that permitted by the Act of Congress. But the Act of Congress does not require that the draft line of the cars used in interstate commerce should be even, but requires that the centers of the draw-bars should be of the standard and uniform height mentioned in the Act. The Act says nothing about draft line but requires that the centers of the draw-bars should be of uniform height with the exception that a variation is permitted between loaded and unloaded cars. For this reason the failure to show what the variation was between the centers of the draft line of the draw-bars on these two cars was not mentioned (material)."

The testimony in this case (R. 53), showed that in railroading when you speak of the center of the draw-bar you mean center of the draw-bar shank or draft line.

By turning to the Tenth Annual Report of the Interstate Commerce Commission, 1896, on page 94, you will find the following: "Attention was called in our last an-

nual report to an apparent misunderstanding among some of the carriers as to the precise meaning of the language used by the American Railway Association, acting under authority conferred by Section 5 of the Act, in fixing the standard height of the draw-bars and the variation to be allowed therefrom as between empty and loaded cars. This Association has since explained its understanding in regard to the standard height for drawbars on standard gauge railroads as follows:

"The standard height of draw-bars for freight cars measured perpendicularly from the level of the top of the rails to the center of draw-bars is 34½ inches with no greater variation allowable than three inches, minimum height 31½ inches.

"*By centers of drawbars is meant the horizontal line through the center of the drawbar shank.* 34½ inches is the standard maximum height, from which there can only be a variation of three inches downward."

Here now is a clear, direct announcement of the American Railway Association, which recommended the heights

adopted by the Interstate Commerce Commission, which promulgate to the railroads and to the country generally its own approval and adoption of the heights recommended. Why, then, should the Supreme Court of the State of Arkansas adopt a different interpretation? Was that Court possessed of specific expert knowledge to promulgate another and better interpretation of the meaning of uniform and standard height?

If the Courts of the States of Arkansas, before which came this cause, had given this interpretation to the Act of Congress relied upon, the defendant in error would have at once lost his cause. All of the testimony in the record shows that there was no difference between the draft lines of the two cars between which Taylor lost his life.

Moreover, the trial Court laid special stress upon the difference allowable between *loaded and unloaded cars.*

Now, the American Railway Association and the Interstate Commerce Commission, when they come to interpret the variation allowable between standard height drawbars, say nothing whatever about loaded and unloaded cars.

In other words, the Act of Congress means that whether the car be loaded to its full capacity, or partially loaded, or empty, there is allowable *at all times* a variation of three inches.

It will be impossible to maintain these drawbars at exactly a uniform height of 31½ inches when loaded and 34½ inches when empty.

At page 92 of the record a witness was asked: "If a car is first built and adjusted to the proper height, what will lower the height from time to time?"

A. "Several things. The wearing of the journal will lower it, the wearing of the brass will lower it; the wearing of the wheel will lower it, and the loading of the car will press on the springs and the compressing of the springs will lower it, and the general wear and tear will drop it a little bit lower."

Q. "Will the sinking of the bolts in the draft timbers lower the carrying iron?"

A. "Yes, sir."

Q. "That will lower the drawbar?"

A. "Yes, sir."

Q. "Is it not a fact that anything which will lower the body of the car will lower the drawbar?"

A. "Yes sir."

Q. "Mr. Bosshardt, has the company provided any means to keep these drawbars up to the standard height when this wear and tear takes place?"

A. "Yes sir."

Q. "What has it done?"

A. "They use what is known as raising-shims."

Q. "What are they?"

A. "Shims are iron—you raise the coupler and drop it over the carrying iron. They are an inch and a half thick, and all car inspectors and car repairers are supplied with a supply of them."

It will appear from this that all railroad men clearly understand what was meant by uniform and standard height and what it referred to and what provisions had been made to maintain it, and yet with all of this testimony in this record, the trial Court and the Supreme Court of the State of Arkansas interpreted the Act of Congress entirely and radically different from the interpretations placed upon it by the American Railway Association and the Interstate Commerce Commission and by all the railway employees who testified in this case. This erroneous interpretation of the Act of Congress was prejudicial to the plaintiff in error.

IV.

The plaintiff in error asked the Court to charge the jury as follows (R. 126): "The Court tells you that if you find from the evidence in this case that the defendant equipped all its cars with uniform and standard height drawbars when such cars are first built and turned out of the shops, then the defendant is only bound to use ordinary care to maintain such drawbars at the uniform and stand-

ard height mentioned in the testimony." The Court refused to give this instruction, held the plaintiff in error imperatively to equip and *maintain* its cars at all times and under all circumstances with uniform and standard height drawbars, and this too in the fact of a record which showed the utter impossibility of such equipment and maintenance.

(See testimony of Bosshardt hereinbefore referred to.)

Again (R. 99) the following question was asked:

Q. "After a car is built to standard and the drawbar of standard height, what things will affect it so as to lower the drawbar from time to time?"

A. "Quite a number of different causes for lowering a drawbar. A brass wearing will let the drawbar down, the wearing of the journal will lower it, weak springs after it has been in service for a long time will lower it. Anything that will lower the body of the car will lower it. Then sometimes the draft timbers will lower it some caused from different causes. Sometimes the bolts will pull down in the draft sills; sometimes the carrying iron bolts that

hold the carrying iron in the dead wood will pull down in the dead wood a little, and sometimes the nuts or taps on the bolts will turn down a little."

Q. "All of these things will have a tendency to lower it?"

A. "Yes sir."

Q. "What provision has the company made to meet this constant lowering?"

A. "One provision is to take the cars into the repair track when found below the standard height, if they need no other repairs generally raise the coupler up and put in another draft timber; sometimes cut out the draft timber a little on the bottom and raise the carrying iron. Usually when in service they furnish what we call a cast raising iron. That is what we usually term it."

Q. "Same thing as a shim?"

A. "It is a shim. Fits down over the carrying iron like this, and the coupler rests on top of it and it holds it on top of the carrying iron."

And again (R. 60):

Q. "Where did you keep shims?"

A. "We had a supply in the caboose. They furnished them to us."

Q. "What was the object in that?"

A. "To keep the drawheads raised up."

Q. "To keep them in uniform and standard height?"

A. "Yes sir."

Q. "You were furnished a supply in the caboose?"

A. "Yes sir."

Q. "If you find a drawbar that has dropped down for any reason while in transit, what is your duty?"

A. "Shim it up. Put a shim under it and bring it up to standard height."

Q. "How long does it take to put one of these shims in?"

A. "Sometimes you can put one in in a half a minute and sometimes it takes two or three minutes, owing to the condition of the car, if you don't have to cut the train to put them under."

Now, it will be seen from the record in this case that the railroad witnesses understood thoroughly what was meant by uniform and standard height—that the railroad company understood what was meant by uniform and standard height, and it made ample provision for maintaining that uniform and standard height by the furnishing to its train crews of a supply of metallic shims to be placed over the carrying irons so as to raise the drawbars sufficiently to meet the requirements of the Act of Congress. The Supreme Court of the State of Arkansas upheld the trial Court's interpretation of this Act of Congress and held the railroad company to arbitrarily maintain its drawbars at uniform and standard height regardless of the showing made in this record.

The Supreme Court of the State of Arkansas said (R. 137):

"Again counsel for appellant contends that if it be admitted that the drawbars were defective, still there is no evidence that the defendant had notice of the defect, and that upon that ground plaintiff failed to make out his case. It is true that as a general rule the master is only bound to use ordinary care to provide suitable and safe machinery for the servant and is liable for damages caused by defective machinery only when the defect is the result of negligence on his part, as when he neglected to repair the defect after having notice of the same, or when by the use of ordinary care he should have known that the machinery or appliances were defective. In such cases the plaintiff must show knowledge of the defect on the part of the master or that its lack of knowledge was due to negligence, for the mere fact of an injury caused by a defect does not of itself make out a case of negligence. But it is different when the injury is caused by a violation of a statutory duty on the part of the master. The statute upon which this case is based does not say that the company shall use ordinary care to provide their cars with drawbars of a certain height but it imposes as a positive duty upon

the railroad companies that they shall do so." We respectfully urge that this interpretation of this very important Federal Statute was wrong—was radically wrong, and that it presents for the determination of this Court a Federal question of grave importance to all the railroads in the United States.

The plaintiff in error sought further to be relieved from this erroneous interpretation of the Act of Congress by requesting the following instruction (R. 153):

"If you find from the evidence in this case that, although the drawbar may be adjusted to the standard height when the car is first built and turned out of the shops, that the every day wear and tear of the car continually lower the drawbar, that the defendant, in order to provide against the lowering of the drawbar provides an ample supply of shims ready to the hand of the trainmen and car inspectors, which may be readily and in a very short time placed under the drawbars so as to restore them to uniform and standard height, then the Court tells you that the master has fully performed his duty, and if there was any failure of the

train men, switching crew or car inspectors to use these shims so provided, such failure was the failure of a fellow servant with the deceased and you should find for the defendant."

The trial Court of Arkansas refused this instruction and the Supreme Court of the State of Arkansas upheld that refusal.

This instruction clearly states the law applicable to this case. The accident in which Taylor lost his life occurred in the Indian Territory, where all the trainmen and car inspectors were held under the law to be fellow servants with Taylor, the brakeman. The record shows clearly that the company had built and equipped its cars to standard measurements and with standard height drawbars, as required by the Act of Congress, and then knowing that the every day handling of the car would tend to lower the drawbar, it had provided its train men and car inspectors with an ample supply of shims or devices for maintaining the standard height of drawbars. These shims it had placed in the caboose of the train upon which Taylor was called to perform his duty, and if there was a lack of

uniform and standard height drawbars, this lack could be overcome in from one-half minute to two or three minutes by the trainmen or car inspector simply raising the drawbar and placing the metallic shim over the carrying iron.

We respectfully maintain that the instructions asked for and refused by the trial Court were clearly within the terms of the Act of Congress when properly interpreted, and that had they been given the plaintiff in error would have been discharged from the Court without liability or amercement.

The last opinion delivered in this case by the Supreme Court of the State of Arkansas is unique in many respects and upholds by a divided Court the former opinion of that Court in its interpretation of this very important Act of Congress. The dissenting opinion of Mr. Justice Battle (R. 144), concludes as follows: "The evidence as to the issues in this case is unsatisfactory. To have avoided prejudice, the instructions to the jury should have been accurate, clear and unambiguous. The instructions we have considered do not meet this requirement and were prejudicial."

In response to the motion of the defendant in error to affirm or dismiss this case, we will not pursue the inquiry further. We believe that we have demonstrated quite clearly that this is a case for the careful consideration of this Court to the end that the provisions of the Act of Congress of 1893, known as the "Safety Appliance Act," may be thoroughly and properly interpreted, so that the Courts of the country everywhere may know precisely what is meant by the terms of that Act.

We respectfully submit that the motion of the defendant in error should be overruled and that this case should stand for ultimate hearing upon full abstracts and carefully prepared briefs.

Respectfully,

OSCAR L. MILES,

Attorney for Plaintiff in Error.

Office Supreme Court,
FILED.
OCT 17 1907
JAMES H. McKENN

IN THE

Supreme Court of the United States

No. 201.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR.

VS.

MAY TAYLOR, ADMINISTRATRIX IN SUCCESSION OF THE ESTATE OF GEORGE W. TAYLOR, DECEASED, DEFENDANT IN ERROR.

MOTION BY DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

SAM R. CHEW,
Attorney for Defendant in Error.

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Now comes the above named defendant in error and moves the court to dismiss or affirm this cause, because this court has no jurisdiction of this cause, on a writ of error; and because it is apparent from the record and clearly manifest that the question upon which the jurisdiction of this court depends is so frivolous as to need no argument or authorities cited to support the motion to affirm; and because it is apparent from the record that the writ of error was taken for delay merely.

HISTORY AND STATEMENT OF THE CAUSE FROM THE PRINTED RECORD BY DEFENDANT IN ERROR.

This cause is here for adjudication from a judgment of the Supreme Court of the State of Arkansas, affirming a judgment on appeal to that court by plaintiff in error from the Circuit Court of Crawford County, in the State of Arkansas.

(Printed Record, pp. 138, 148, 149 and 150.)

This action was originally brought to the June 1899, Term of the Crawford Circuit Court, in the State of Arkansas, by Jonathan Neal, as Administrator of the estate of George W. Taylor, deceased, against the plaintiff in error. The complaint upon which the judgment is based, omitting the heading, reads as follows:

COMPLAINT AT LAW.

"Comes the plaintiff, Jonathan Neal, as administrator of the estate of George W. Taylor, deceased, and for his cause of action against the defendant, St. Louis, Iron Mountain & Southern Railway Company, says: That on the 21st day of February, 1899, the Probate Court of Crawford County, Arkansas, granted him letters of administration upon the estate of George W. Taylor, deceased; and that he is now duly qualified and acting administrator upon said estate; that the said defendant is the owner, in possession of, managing, operating and controlling a line of railway, engaged in interstate traffic, extending from the City of Van Buren, Arkansas, through and across the Indian Territory, to the City of Coffeyville, Kansas. That the town of Sallisaw, Indian Territory, is upon said line of railway; that the plaintiff's intestate, Geo. W. Taylor, was on the 3d day of May, 1892, a citizen and resident of Van Buren, Crawford County, Arkansas, and remained such until the date of his death. That on said 3d day of May, 1892, plaintiff's intestate entered into a contract with

the defendant at Van Buren, Arkansas, for the performance of duties as brakeman, upon defendant's trains, running from Van Buren, Arkansas, through the Indian Territory to Coffeyville, Kansas.

"That plaintiff's cause of action arises under an act of Congress, and in the trial of said cause there will be a controversy as to the construction of said act of Congress.

"That on the 18th day of January, 1899, the defendant, disregarding its duty to plaintiff's intestate, maintained and equipped two of the freight cars in one of its westbound freight trains in so negligent, wrongful, improper, defective and unsafe condition that plaintiff's intestate, at said town of Sallisaw, Indian Territory, while in the discharge of his duty, as a brakeman, as aforesaid, and while attempting to make a coupling between said two cars, was caught between said cars, mashed, crushed and instantly killed, on account of said wrongful and improper equipment of said two cars, and the negligent, defective and dangerous condition of same; that said cars were wrongfully and improperly equipped, and in a dangerous and defective condition, in this: said cars were not equipped with automatic or safety couplers, the draw bars on said cars were not of even, uniform or standard height, as required by the laws of Congress, 'and that in the trial of this case said act of Congress will have to be construed by the court, and that there will be a controversy as to the construction of said act of Congress.'

"And the draw bars on said cars were faulty, cracked and in an unsafe and defective condition. That the defendant knew, or by an exercise of ordinary care and diligence, could have known of the wrongful, improper and unsafe equipment of said cars, and the dangerous and defective condition thereof (that each of said cars were at the time loaded, and were engaged in interstate traffic); that, on account of the said wrongful, improper and unsafe condition of said cars, and the dangerous and defective condition of same when said cars were pushed together for the purpose of being coupled, one of the draw bars passed over the other, and each of said draw bars became cracked and

broken, thereby catching plaintiff's intestate between said cars, crushing and killing him as aforesaid, while in the discharge of his duty, attempting to couple said cars as aforesaid, without any fault or negligence on his part.

"That plaintiff's intestate left a widow, May Taylor, him surviving and William Neal, a son nine years old, and Lorna Doon Taylor, a daughter six years old, and Geo. W. Taylor a daughter one year old, his only children and next of kin, who were poor and dependent upon him for support. That said children were also dependent upon him for nurture and education; that, on account of said negligent and wrongful acts of defendant, said widow and next of kin have been deprived of their only means of support, said widow has lost the society of her husband; and said children have been deprived of the value of the training and instruction of their father. All to their great damage in the sum of $15,000.00.

Wherefore plaintiff prays judgment against the defendant for said sum of $15,000.00, for the use and benefit of the widow and next of kin, and for the costs of this action.

CHEW & FITZHUGH, AND
W. H. NEAL,
Attorneys for Plaintiff.

(Printed Record, pp. 1 and 2.)

To this complaint defendant filed its answer, which, omitting the heading, reads as follows, to-wit:

ANSWER.

"Comes the defendant, the St. Louis, Iron Mountain and Southern Railway Company, and, for its answer to the complaint of the plaintiff in this case, says:

"It has no knowledge upon which to base a belief as to whether or not on the 21st day of February, 1899, the Probate Court of Crawford County, Arkansas, granted to plaintiff letters of administration upon the estate of George W. Taylor, deceased, and that he is now the duly qualified

and acting administrator of said estate, and defendants asks that plaintiff be held to strict proof of his allegations in this regard.

"For the same reason the defendant asks that the plaintiff be held to a strict proof of his allegations that George W. Taylor was on the 3d day of May, and remained until the day of his death, a citizen and resident of Van Buren, in Crawford County, Arkansas.

"Defendant denies that, on the 18th day of January, 1899, it, disregarding its duty to plaintiff's intestate, maintained and equipped two of its freight cars in one of its west-bound freight trains—so negligent, wrongful, improper, defective and unsafe condition, that plaintiff's intestate at the town of Sallisaw, Indian Territory, while in the discharge of his duty, as brakeman for the defendant, and while attempting to make a coupling between said two cars, was caught between said cars, mashed, crushed, and instantly killed, on account of said wrongful and improper equipment of said two cars, and the negligent, defective and dangerous condition of the same. Defendant denies that said cars were wrongfully and improperly equipped, and in a dangerous and defective condition, in this, that said cars were not equipped with automatic or safety couplers and the draw heads of said cars were not of even, uniform and standard height, as required by the laws of Congress; and defendant denies that said draw bars of said cars were faulty, cracked and in an unsafe and defective condition. Defendant declares that it had complied with all requirements of all laws of Congress in the equipment of its car with automatic or safety couplers, and with draw bars of uniform or standard height, and defendant says that, upon the development of the facts under a correct reconstruction of the laws of Congress, and the rulings of the Interstate Commerce Commission, pursuant to the provisions of said laws affecting this case, defendant will be shown to have been guilty of no negligence or default whatever in the matter of its car equipment. Defendant denies that it knew, or by the exercise of ordinary care and diligence could have known, of any wrongful, improper and un-

safe equipment of said cars, and the dangerous and defective condition thereof. Defendant denies that on account of the wrongful, improper and unsafe equipment of said cars and the dangerous and defective condition of same, when said cars were pushed together, for the purpose of being coupled, one of the draw bars passed over the other and each of said draw bars became cracked and broken, thereby catching plaintiff's intestate between said cars and crushing and killing him, as aforesaid, while in the discharge of his duty attempting to couple said cars, as aforesaid, without any fault or negligence on his part.

"Defendant declares the fact to be that if plaintiff's intestate was crushed and killed while attempting to couple the cars on defendant's railroad, on the 18th day of January, 1899, at Sallisaw, Indian Territory, he was so crushed and killed because of his own contributory negligence at the time, and that, without such contributory negligence, the injury and his death would not have occurred.

"Defendant denies that on account of any negligence or wrongful acts of defendant, May Taylor, widow, William Neal Taylor, son, and Lora Doon Taylor, daughter, of plaintiff's intestate, have been deprived of their only means of support, and that said widow has lost the society of her husband, and that said children have been deprived of the value of the training and instruction of their father; all to their great damage in the sum of fifteen thousand dollars ($15,000.00) or any other sum whatever.

"Wherefore, having answered in all respects, plaintiff's complaint, the defendant asks to be discharged hence with all its costs in this behalf laid out and expended.

OSCAR L. MILES,
Attorney for Defendant."

(Printed Record, pp. 3 and 4.)

Before filing the answer, plaintiff in error filed a petition to remove the cause from the state court to the United States Circuit Court, in and for the Western District of Arkansas, Fort Smith division. Said petition, omitting the heading, reads as follows, to-wit:

"To the Honorable, Circuit Court of Crawford County, State of Arkansas:

"Your petitioner, the St. Louis, Iron Mountain and Southern Railway Company, respectfully shows that it is the defendant in the above entitled suit, and that the matter and amount in dispute in said suit exceed, exclusive of the interest and cost, the sum or value of $2,000.00.

"That your petitioner was, at the time of the bringing of this suit, and still is, a citizen of the State of Arkansas, and that said plaintiff was then, and still is, a citizen of the State of Arkansas.

"That said suit is of a civil nature, and was instituted by the plaintiff against the defendant for the purpose of recovering damages for the alleged negligent killing of plaintiff's decedent by the alleged negligent movement of one of defendant's trains, in the Indian Territory, in the United States of America.

That said suit is one arising under the laws of the United States, in this, to-wit: That, prior to the passage, by the Congress of the United States, of an act, placing in force in the Indian Territory, certain statutes of the State of Arkansas, no action would lie for death by wrongful act in the Indian Territory; and that, if the plaintiff is entitled to maintain his cause of action in this behalf, he is entitled to maintain said cause of action solely by reason of the passage of the aforesaid act of Congress, placing in force in the Indian Territory, Chapter 119 of Mansfield's Digest, of the statutes of the State of Arkansas.

"And your petitioner further alleges that the aforesaid act of Congress of the United States is not a general law of Congress, applicable alike to all the States, but is a special law, and only locally applicable to the Indian Territory; that plaintiff's cause of action arises under, and has its origin in, this said act of Congress, and that, at the trial of the said cause of action, it will be necessary to construe this act of Congress, in order to properly determine the relative rights of the plaintiff and the defendant in this suit.

"And your petitioner offers herewith bond, with good

and sufficient surety, for its entering in said Circuit Court of the United States on the first day of the next session, a copy of the record in this suit, and for paying all costs which may be awarded by said Circuit Court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

"And your petitioner prays this honorable court to proceed no further herein, except to make an order for the removal of this cause to the said Circuit Court of the United States, and to accept said surety and bond, and cause the record herein to be removed into said Circuit Court of the United States, Fort Smith division, and it will ever pray.

OSCAR L. MILES,
Attorney for Petitioner."

(Printed Record, pp. 5 and 6.)

There was a proper bond accompanying this petition to remove, which is not here questioned, and the state court, having the petition for removal under advisement, made and entered the following order, removing the cause from the State Circuit Court, to the United States Circuit Court for the Western District of Arkansas, Fort Smith division. Said order reads as follows, to-wit:

"And the court, having said petition and bond for removal under advisement, and finding the same in all respects regular and in compliance with the law in such cases, made and provided, did direct that this cause be transferred to the United States Circuit Court, for the Western District of Arkansas, Ft. Smith division, and the same was accordingly done."

(Printed Record, p. 7.)

And after this cause was removed from the State Circuit Court to the United States Circuit Court, defendant filed in the United States Circuit Court his motion to remand the cause to the State Court for trial. This motion reads as follows, to-wit:

MOTION TO REMAND TO THE STATE COURT.

"Comes the plaintiff and moves the court to remand this cause to the Circuit Court of Crawford County, Arkansas, for trial, in which court this cause was originally brought, and for cause, says:

"That both parties both plaintiff and defendant, are and were at the time of the bringing of said cause, citizens of the State of Arkansas, and that there is no Federal question involved in the trial of this cause, so as to give this court jurisdiction of the subject matter.

"Wherefore, plaintiff prays an order of this court remanding this cause to the Circuit Court of Crawford County, Arkansas, for trial, and for all other legal and proper relief.

W. H. NEAL, AND
CHEW & FITZHUGH,
Attorneys for Plaintiff."

(Printed Record, pp. 7-8.)

This motion was by the United States Circuit Court of the Fort Smith division, of the Western District of Arkansas, sustained, and the following order was made and entered of record in the said United States Circuit Court, remanding this cause to the Crawford Circuit Court for trial:

August 15, 1899.

"Be it remembered that on the 15th day of August, 1899, the above cause came on to be heard, upon a motion heretofore filed by the plaintiff to remand this cause to the Circuit Court of Crawford County, in the State of Arkansas, for trial, and the court, after having heard the argument of counsel for plaintiff and defendant, and being otherwise sufficiently advised doth sustain said motion to remand. It is, therefore, considered, ordered, adjudged by the court that the said cause of Jonathan Neal, Administrator of the estate of Geo. Taylor, deceased, against the St. Louis, Iron Mountain & Southern Railway, be and the

same is hereby remanded to the Circuit Court of Crawford County, Arkansas, for trial.

"*United States of America,*

Western Division of Arkansas, Fort Smith Division:

"I Thomas Boles, Clerk of the Circuit Court of the United States for the Fort Smith division of the Western District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing transcript annexed to this certificate is a true and complete copy of the proceedings had, and orders of court made in the case of Jonathan Neal, Adm'r of estate of Geo. W. Taylor, deceased, against St. Louis, Iron Mountain and Southern Railway Company. The original of which remains of record in my office.

"In testimony whereof, I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 28th day of August, A. D. 1899.

THOMAS BOLES, *Clerk.*

(Printed Record, p. 10.)

After this cause was remanded to the Crawford Circuit Court for trial, plaintiff in error filed the following motion to dismiss this cause in the Crawford Circuit Court, to-wit:

MOTION TO DISMISS—MOTION OVERRULED.

"The above entitled cause coming on to be heard, the defendant, the St. Louis, Iron Mountain and Southern Railway Company, moved to dismiss said cause from the docket of this court, for the reason that the same is in law and fact pending in the United States Circuit Court for the Western District of Arkansas, Ft. Smith division, and the court, having said motion under advisement, overruled the same; and to the action of the court in this behalf the defendant at the time excepted."

(Printed Record, p. 11.)

This motion to dismiss was by the Crawford Circuit Court overruled, whereupon defendant in error, by leave of the court amended his complaint so as to read as follows:

"That plaintiff's cause of action arises under an act of Congress and in the trial of said case there will be a controversy as to the construction of said act of Congress.

"And that in the trial of this case said act of Congress will have to be construed by the court, and that there will be a controversy as to the construction of said act of Congress."

(Printed Record, p. 11.)

After this amendment was made, plaintiff in error filed its second motion to remove to the United States Circuit Court, which motion or petition reads as follows, to-wit:

"To the Honorable the Circuit Court of Crawford County, State of Arkansas:

"Your petitioner, the St. Louis, Iron Mountain and Southern Railway Company, respectfully shows that it is the defendant in the above entitled suit, and that the matter and amount in dispute in said suit exceeds, exclusive of the interest and costs, the sum or value of $2,000.00.

"That said petitioner was, at the time of the bringing of this suit and still is, a citizen of the State of Arkansas, and that said plaintiff, was then and still is, a citizen of the State of Arkansas.

"That said suit is of a civil nature, and was instituted by the plaintiff against the defendant, for the purpose of recovering damages for the alleged negligent killing of plaintiff's decedent by the alleged negligent movement of one of defendant's trains in the Indian Territory, in the United States of America.

"That said suit is one arising under the laws of the United States, in this, to-wit: That prior to the passage by the Congress of the United States, of an act placing in force in the Indian Territory, certain statutes of the State of Arkansas, no action would lie for death by wrongful act in the Indian Territory; and that if plaintiff is entitled to maintain his cause of action in this behalf he is entitled to maintain said cause of action solely by reason of the passage

of the aforesaid act of Congress, placing in force in the Indian Territory Chapter 119, of Mansfield's Digest of the statutes of the State of Arkansas.

"And your petitioner further alleges that the aforesaid act of Congress of the United States is not a general law of Congress applicable alike to all the states, but is a special law, and applicable locally only to the Indian Territory. That plaintiff's cause of action arises under and has its origin in this said act of Congress and that at the trial of said cause of action, if plaintiff shall be able to recover, it will be by reason of the construction placed upon this act of Congress; and, at the trial of this cause of action, it will be necessary to construe this act of Congress in order to properly determine the relative rights of the plaintiff and the defendant in this suit.

"And your petitioner further shows that, subsequent to the filing of its former petition and bond for removal of this cause to the United States Circuit Court for the Western District of Arkansas, Ft. Smith division, plaintiff amended his complaint, thereby alleging negligence upon the part of defendant in that defendant had not complied with certain laws of Congress requiring defendant's cars to be equipped with automatic or safety couplers. Your petitioners would show that it is a common carrier, engaged in interstate commerce, and was such at the time of the injuries alleged in plaintiff's complaint, and that the aforesaid laws of Congress and those hereinafter referred to, are applicable to your petitioner. Your petitioner would show that at the trial of this cause it will be necessary to construe a certain act of Congress, of March 2, 1893, requiring railroads to equip their cars with automatic and safety couplers; it will be necessary to construe the action of the Interstate Commerce Commission, taken on December 23, 1893, whereby the time for the equipment of defendant's cars with automatic and safety couplers was alleged to have been extended; it will be necessary for the court to determine whether or not defendant, under the terms and provisions of this Federal law, and the action of the Interstate Com-

merce Commission, a Federal creation, deriving all of its authority from Federal Law, was negligent as alleged in plaintiff's complaint.

"Your petitioner asks that the amended complaint or plaintiff together with the answer of defendant filed herein, be taken, made and considered as a part of this petition.

"And your petitioner offers herewith bond, with good and sufficient surety, for its entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs which may be awarded by said Circuit Court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

"And your petitioner prays this Honorable Court to proceed no further herein, except to make an order for the removal of this cause to the said Circuit Court of the United States, and to accept said surety and bond, and cause the record herein to be removed into said Circuit Court of the United States in and for the Western District of Arkansas, Ft. Smith division, and it will ever pray.

OSCAR L. MILES,
Attorney for Petitioner."

(Printed Record, pp. 12-13.)

There was proper bond accompanying this motion, which is not here set out, as there is no question raised about it.

This second petition to remove to the United States Circuit Court was by the Crawford Circuit Court overruled, and the cause went to trial to a jury, resulting in a verdict and judgment for plaintiff in error. From this judgment defendant in error prosecuted an appeal to the Supreme Court of the State of Arkansas, and this judgment against defendant in error was, by the Supreme Court of the State of Arkansas reversed and remanded for a new trial.

(Printed Record, pp. 14-15.)

After this cause was remanded to the Crawford Circuit Court by the Supreme Court of the State of Arkansas plaintiff in error renewed its motion to dismiss said cause, which said motion reads as follows, to-wit:

> "Comes the defendant the St. Louis, Iron Mountain and Southern Railway Company, and protests the trial of this cause in this court for the reason that said cause is only triable in the United States Court at Ft. Smith, Arkansas, and moves the court to dismiss this cause from the docket of this court and to direct that the same be removed to the United States District Court for the Western district of Arkansas, Fort Smith Division, for trial.
>
> (Signed)
>
> ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
> *By* OSCAR L. MILES, *Attorney.*

(Printed Record, p. 15.)

This motion was by the Crawford Circuit Court overruled. (Printed Record, p. 16.)

Thereupon, this cause went to trial in the Crawford Circuit Court upon its merits, resulting in a verdict and judgment for defendant in error. (Printed Record, pp. 130-131.)

From this judgment plaintiff in error prosecuted its appeal to the Supreme Court of the State of Arkansas. (Printed Record, p. 132.)

During the pendency of this appeal, Jonathan Neal died, and this cause was, by the Supreme Court of the State of Arkansas, revived in the name of May Taylor, as adminstratrix in succession. (Printed Record, p. 133.)

The judgment of the Crawford Circuit Court was, by the Supreme Court of the State of Arkansas, affirmed. (Printed Record, p. 134.)

From this judgment of affirmance plaintiff in error, sued out a writ of error from the Supreme Court of Arkansas to this court. (Printed Record, pp. 176-177.)

In support of this writ of error plaintiff in error makes thirty-one different assignments of error, which are as follows, to-wit:

ASSIGNMENT OF ERRORS.

"Now comes the said plaintiff in error and respectfully submits that in the record, decision and final judgment of the Supreme Court of the State of Arkansas in the above entitled matter, there is manifest error in this, to-wit:

"First. The court erred in upholding the action of the trial court in taking jurisdiction of this cause after the same had been remanded from the United States Circuit Court for the Western District of Arkansas, Ft. Smith division, to which the same had been carried on plaintiff's first petition for removal.

"Second. The court erred in upholding the action of the Crawford Circuit Court, in refusing to transfer this cause to the United States Circuit Court for the Western District of Arkansas, Ft. Smith division, on the plaintiff's second petition for removal.

"Third. The court erred in upholding the action of the Crawford Circuit Court in refusing to direct a verdict for the defendant, on plaintiff in error's motion, on the ground that comity does not move between State and Federal Courts and that, though a cause of action may be transferred between State Courts, there can be no such thing as transitory jurisdiction between State and Federal Courts:—it appearing from the record that the cause of action herein sought to be recovered upon arose in the Indian Territory, where only existed United States Courts; that the plaintiff in the court below was a citizen of the State of Arkansas, and had qualified as administrator in the State of Arkansas.

"Fourth. The court erred in upholding the action of the Crawford Circuit Court in refusing to dismiss this

cause on the various motions of the plaintiff in error that said cause was in law and in fact pending in the United States Court at Ft. Smith, Arkansas.

"Fifth. The court erred in upholding the action of the trial court in its refusal on motion of the defendant to direct a verdict in favor of the defendant for the reason that the testimony in the cause, taken in its strongest probative sense, most favorable to the plaintiff, was insufficient to support a verdict against the defendant, under the act of Congress, of March 2, 1893.

"Sixth. The court erred in upholding the action of the trial court in refusing to direct a verdict in favor of the defendant for the reason that, as it was alleged, the Congress of the United States had passed no law requiring a uniform and standard height of draw bars on cars engaged in interstate commerce, the only regulation on that subject being made upon the suggestion of the American Railway Association and at the request of the Interstate Commerce Commission, which, in legal effect, constituted at most only a rule or regulation of the Interstate Commerce Commission.

"Seventh. The court erred in upholding the instructions, and each paragraph thereof, given by the trial court of its own motion as being correct and as presenting a proper construction of the act of Congress of March 2, 1893.

"Eighth. The court erred in upholding the action of the trial court, in refusing to give instruction No. 12, asked for by the defendant, as follows:

" '12. You are instructed that at the time Brakeman Taylor was killed, defendant owed no duty to said Taylor to have all its cars equipped with automatic couplers, an act of Congress requiring such automatic couplers not at that time being in force.'

"Ninth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 17, asked for by the defendant, as follows:

" '17. Before you can find for the plaintiff in this action, you must find that there was more than three inches difference in the perpendicular height of the shanks of the

draw heads in the two cars that came together and crushed Taylor, measured from the top of the rail to a horizontal line drawn through the middle of each shank of each draw head; and, further, you must find, if there was such difference, that the difference was due to the improper original construction of the cars, and not due to ordinary wear or incidental breakage of any of the supports in said cars which would affect said heights of said draw bars.'

"Tenth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 18, asked by the defendant, as follows:

" '18. If you find from the evidence in this case that the accident which resulted in the death of Brakeman Taylor, occurred in the Indian Territory, and that J. Neal, administrator, resides in the State of Arkansas, and was appointed adminstrator under the laws of the State of Arkansas, and has brought this action in the State of Arkansas, then the court tells you that he cannot maintain said action, and you should find for the defendant.'

"Eleventh. The court erred in upholding the action of the trial court in its refusal to give instruction No. 19, asked for by the defendant, as follows:

" '19. If you find from the evidence in this case that by a statute of the State of Arkansas conductors having superintendence or control over trainmen are not fellow servants with the brakemen and other trainmen, but are vice-principals, and that no such statute is in force in the Indian Territory, and that the death for which damages are claimed in this action occurred in the Indian Territory, then this action cannot be maintained in the State of Arkansas by reason of the dissimilarity of the statutes in the two jurisdictions.'

"Twelfth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 20, asked for by the defendant, as follows:

" '20. If you find from the evidence in this cause that the death of Brakeman George W. Taylor, was caused by an accident in the Indian Territory, and that this suit for damages on account of such death is brought in the State of Arkansas, and that in the State of Arkansas, there is a

statute which makes all the railway employes in different departments, although in the service of the same company, employed by the same company, paid by the same company, *and laboring to a common purpose, not fellow servants,* but vice-principals to each other, and that no such statute exists in the Indian Territory, then this action cannot be maintained in the State of Arkansas by reason of the dissimilarity of the laws of the two jurisdictions touching the same subject matter.'

"Thirteenth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 21, asked for by the defendant, as follows:

" '21. If you find from the evidence that by reason of the law of the State of Arkansas persons who having been killed or injured by the reason of the negligence of a railroad company, and who having obtained judgment for such negligent injury or killing, have a lien upon the road bed and franchise of such railroad to secure the collection of such judgment and that no such law as this is in force in the Indian Territory, then this action cannot be maintained in the State of Arkansas, and you should find for the defendant.'

"Fourteenth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 22, asked for by the defendant, as follows:

" '22. If you find from the evidence in this cause that, although a draw bar may be adjusted to the standard height when the car is first built and turned out of the shop, that the every-day wear and tear of the car continually lower the draw bar; that the defendant, in order to provide against the lowering of the draw bar, provides an ample supply of shims ready to the hands of the trainmen, and car inspectors, which may be readily and in a very short time placed under the draw bars so as to restore them to uniform and standard height, then the court tells you that the master has fully performed his duty, and if there was any failure of the trainmen, switching crew or car inspectors to use these shims so provided, such failure was the failure of a fellow servant with the deceased and you should find for the defendant.'

"Fifteenth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 23, asked for by the defendant, as follows:

" '23. The court tells you that if you find from the evidence in this case the defendant equipped all of its cars with uniform and standard height draw bars when such cars were first built and turned out of the shops, then the defendant is only bound to use ordinary care to maintain such draw bars at the uniform and standard height spoken of in the testimony.'

"Sixteenth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 24, asked for by the defendant, as follows:

" '24. By the center of the draw bar is meant the center of the draw bar shank, or the center of the draft line of the draw bar.'

"Seventeenth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 25, asked for by the defendant, as follows:

" '25. By standard height is meant from thirty-one and one-half inches to thirty-four and one-half inches, measured perpendicularly from the face of the rail to the center of the draft line in the draw bar.'

"Eighteenth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 26, asked for by the defendant, as follows:

" '26. Cars are of uniform and standard heights when the centers of the draw bar shanks are not less than thirty-one and one-half inches nor more than thirty-four and one-half inches, measured perpendicularly, above the face of the rail.'

"Nineteenth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 27, asked for by the defendant, as follows:

" '27. The court charges you that the act of Congress allows a variation in height of three inches between the centers of the draw bars of all cars used in interstate commerce, the measurement of such height to be made perpen-

dicularly from the top of the rail to the center of the draw bar shank or draft line.'

"Twentieth. The court erred in upholding the action of the trial court in its refusal to give instruction No. 28, asked for by the defendant, as follows:

" '28. The court charges you that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centers of the draw bars of such cars, without regard to the amount of weight in the partially loaded car.'

"Twenty-first. The court erred in upholding the action of the trial court in its refusal to give instruction No. 29, asked for by the defendant, as follows:

" '29. Before the plaintiff can recover in this case, he must show, by a preponderance of the testimony, that there was more than three inches difference in the height between the centers of the draft lines in the draw bars in the cars between which Taylor lost his life, and that such difference, if it existed, was the proximate or producing cause of his death, or that it contributed along with other causes, aside from the deceased's own conduct, to produce such death.'

"Twenty-second. The court erred in upholding the action of the trial court in its refusal to give instruction No. 30, asked for by the defendant, as follows:

" '30. Before you can find for the plaintiff, you must find that there was a difference of more than the law allowed between the draw bars, at the time the cars came together, and that such difference was the proximate cause of the death of Taylor.'

"Twenty-third. The court erred in upholding the action of the trial court in its refusal to give instruction No. 31, asked for by the defendant, as follows:

" '31. In view of the closing argument made by counsel for the plaintiff, in the regard to the difference in heights of draw bars, allowed by law, defendant asks the court to charge the jury, that if they find that there was only one inch difference in the heights of the centers of the draw bars in the ends of the cars which came together and killed

George Taylor, this difference will not justify you in finding in favor of the plaintiff in this case.'

"Twenty-fourth. The court erred in upholding the action of the trial court in excluding the testimony of witness J. M. Walsh, offered by the defendant.

"Twenty-fifth. The court erred in upholding the action of the trial court in excluding the testimony of certain witnesses as to matters of *res gestae* and spontaneous declarations, occurring simultaneously with the accident and death of Geo. W. Taylor.

"Twenty-sixth. The court erred in upholding the action of the trial court in refusing to exclude the testimony of witness Joe Curtice.

"Twenty-seventh. The court erred in upholding the action of the trial court in refusing to exclude that part of the testimony of witness Joe Curtice with reference to the difficulty of coupling a car, involved in this controversy, to another car not involved in this controversy, on the evening of the accident.

"Twenty-eighth. The court erred in holding that the verdict of the jury in this case was supported by the law as embodied in the act of the Congress of the United States.

"Twenty-ninth. The court erred in holding that the verdict of the jury in this case was supported by sufficient testimony under the act of Congress of the United States.

"Thirtieth. The court erred in ordering judgment to be entered against this defendant..

"Thirty-first. The court erred in holding that the plaintiff in this case in the court below was entitled to recover under the act of Congress, of March 2, 1893.

Because of the foregoing errors it is asked that the judgment in this case be reversed.

Respectfully submitted,

OSCAR L. MILES,

Attorney for Plaintiff in Error."

(Printed Record, pp. 151-155.)

BRIEF AND ARGUMENT.

It seems to the writer that the above history or statement of this cause is alone sufficient to bring about its dismissal or affirmance, without further argument or citing of any authorities. We, however, call the court's attention to the fact that plaintiff in error seeks the jurisdiction of this court upon one proposition only, and that is that the acts of Congress putting into force and effect Chapter 119 of Mansfield's Digest, in the Indian Territory and the act of Congress of March 2, will in the trial of this cause have to be construed. This is not sufficient to confer jurisdiction on this court by writ of error. The fact that an act of Congress may have to be construed in the progress of the trial of a law suit, in order to determine the relative rights of the litigants, raises no Federal question and does not draw into question the validity of the act; and, without a Federal question being properly raised and presented in the courts below this court is without jurisdiction as between plaintiff in error and defendant in error, because both of them are citizens of the same state, the State of Arkansas. Indeed, the only Federal question raised or attempted to be raised by plaintiff in error is that an act of Congress will have to be *construed*. This, we submit, if the court pleases, is not sufficient and does not draw into question the *validity* of the acts of Congress.

In order to give this court jurisdiction over judgments or decrees from the highest court of a state, both of the following conditions must affirmatively appear from the record:

First, there must be drawn in question the validity of a treaty or statute of the United States.

Second, the decision of the highest court of a state must be against the validity of a treaty or statute of the United States.

Unless both of these conditions affirmatively appear from the record then this court cannot take jurisdiction of a judgment or decree of the highest court of a state.

Section 709, Revised Statutes of the United States.

Plaintiff in error, by its answer and its motions or petitions to remove from the State to the United States Court, does not draw into question the *validity* of any act of Congress or Federal Statute. Indeed it does not question the validity of any act of Congress or Federal Statute. The only thing that it does is to say that during the progress of the trial of this cause these acts of Congress will have to be construed in order to determine the relative rights of the plaintiff and defendant, and that, upon a proper construction being placed upon these acts, and the rulings of the Interstate Commerce Commission, it will be shown to have been guilty of no negligence or default whatever.

We submit, if your honors please, that by the answer and petition no question is raised; the validity of no statute is drawn into question, but indeed, by the answer and the petition plaintiff in error *concedes the validity* of the acts of Congress, and simply says they must be construed. And, as we have said, before this court can take jurisdiction of this cause by writ of error from the highest court of the state, plaintiff in error must have *drawn* into issue the *validity* of the acts of Congress and the decision of the highest court of the state, in this case the Supreme Court of Arkansas, must have been *against their validity.*

Again, we submit that it is not enough alone to say that an act of Congress or a Federal Statute will have to be construed by the courts; but the *validity* of the act or the statute, must be affirmatively drawn into question.

This court, speaking through Mr. Justice Waite, has said:

> "A cause cannot be removed from a State Court, simply because in the progress of the litigation it may become necessary to give construction to the constitution or laws of the United States. * * * The suit must, in part at least, arise out of a controversy between the parties upon the effect of the constitution or laws upon the fact involved."
>
> *Gold Washing & Water Company* v. *Keyes*, 98 U. S., 199.

We submit, if the court pleases, that there is no controversy disclosed by the record, between plaintiff in error and defendant in error, in regard to the operation and effect of the act of Congress of March 2, 1893 and the act of Congress, putting into effect in the Indian Territory, Chapter 119 of Mansfield's Digest. All that the defendant in error in his complaint says about an act of Congress is that at the trial of said cause "there will be a controversy as to the construction of said act of Congress," and that, in the trial of this case, "said act of Congress will have to be construed by the court." And all that plaintiff in error has to say, in its petition to remove, is *"that it will be necessary to construe a certain act of Congress, of March 2*, 1893. * * * *It will be necessary for the court to determine whether or not the defendant, under the terms and provisions of this Federal law and the action of the Interstate Commerce Commission, a Federal creation, deriving all of its power from Federal Law, was negligent as alleged in plaintiff's complaint."*

By these averments or allegations the validity of the acts is admitted, and the fact that the acts have to be construed, if, indeed they would have to be, in the progress of this cause, raises no controversy and does not question the validity of the acts. If they did question the validity of the acts, then we submit that the decision of the Supreme Court of the State of Arkansas is not against their validity. And for that reason, if none other, this court can take no jurisdiction of this cause by writ of error.

This court, speaking through Mr. Justice Brewer, on the question of jurisdiction on writ of error has used the following strong and here applicable language:

> "It is the settled law of this court that to give it jurisdiction of a writ of error to a State Court, it must appear affirmatively not only that a Federal question was presented to that court for decision, but also that the decision of the question was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or constitution."
>
> *Snell et al.*, v. *City of Chicago, et al.*, 152 U. S., 193-195;
>
> *Miller* v. *Swann*, 150 U. S., 132;
>
> *Eustis* v. *Bowles*, 150 U. S., 361, and authorities cited therein.

Again, we submit that before this court can obtain jurisdiction on a writ of error from the highest court in the state, it is positively necessary that the validity of a Federal Statute must be drawn into question and that question adversely decided against the party setting up any rights or privileges under the Federal Statute. When no such grounds has been presented to or considered by the courts of the state, it cannot be said that

the courts have disregarded or refused to hold a Federal Statu valid.

Scudder v. *New York*, 175 U. S., 32;
Columbia Water Power Co. v. *Columbia Electric Stre Car Company*, 172 U. S., 475.

This court has long since held that where a state law is a mitted to be valid and the only question is whether it has be correctly construed gives this court no jurisdiction.

2 Black (U. S.), 474;
12 How. (U. S.), 59;
5 How. (U. S.), 343.

So, in the case at bar, the only question presented is t construction of a Federal Act or Acts and whether they ha been correctly construed or not, we submit gives this court jurisdiction. It is only contended that a correct constructi of the acts of Congress will result in finding that the plaint in error was guilty of no act of negligence, that would rend it liable in this action. This contention is an admission up the part of plaintiff in error that the acts in question were vali and the fact they had to be construed in the progress of t trial in this action raises no Federal question and gives this cou no jurisdiction on writ of error.

175 U. S., 639;
172 U. S., 58;
191 U. S., 126.

This court, speaking through Mr. Chief Justice Fuller, h said:

"We have repeatedly held that the validity of a statu is not drawn into question every time rights claimed und such statute are controverted, nor is the validity of an a

thority, every time an act is done by such authority, is disputed."

Ferry v. *County of King*, 141 U. S., 668-678.

Again this court has said:

"The fact that the suit may have been brought under a Federal Statute or for the purpose of asserting a right under a Federal Statute, does not raise a Federal question, so as to authorize a writ of error."

McMillians v. *Mining Company*, 197 U. S., 343.

The act of March 2, 1893, has been by this court construed in the case of *Railway Company* v. *Carson*, and there held to be valid.

194 U. S., 907.

We submit, if the court pleases, that if the validity of this act had been properly raised or put in issue, then the fact that the act had been construed by this court, and held to be valid, as it has been, then there is not and cannot be any further controversy as to its validity, and can form no basis for a writ of error to this court.

Leonard v. *Vicksburg Railway Co.*, 198 U. S., 416.

The record in the case at bar affirmatively shows that this cause on motion and petition of plaintiff in error was removed from the State Court to the United States Circuit Court in and for the Western District of Arkansas, Ft. Smith division; and on motion of defendant in error by that court remanded to the State Court, for trial (*vide* Printed Record, pp. 10, 12 and 13).

We might here rest this cause, without further remarks, with every confidence of the motion to dismiss being sustained, because this court has said:

"If the Circuit Court remands a cause and the Stat Court thereupon proceeds to final judgment, the action o seem to follow that it cannot be reviewed on a writ of erro such judgment.. A State Court cannot be held to hav decided against a Federal right, when it is the Federa Court and not the State Court which has denied its posses sion. * * * And, under the Statute, a remanding orde of the Circuit Court is not reviewable by this court on ap peal or writ of error, from or to that court. So it woul seem to follow that it cannot be reviewed on a writ of erro to a State Court. The prohibition being 'no appeal or wri of error from the decision of the Circuit Court, remandin such cause, shall be allowed,' and it is entirely clear tha a writ of error cannot be maintained under Section 709 i respect of such an order, where the State Court has ren dered no decision against the Federal right, but simply ac cepted the conclusion of the Circuit Court."

Nelson v. *Moloney*, 174 U. S., 164-169;
Missouri Pac. Ry. Co. v. *Fitzgerald*, 160 U. S., 556 582.

It will no doubt be urged by plaintiff in error that he wa denied his right of removal upon his second petition, to whic we respond that the question of removal became *res adjudicat* when the United States Circuit Court remanded the cause to th State Court, because the second petition is as void of any Federa question as was the first petition. In fact, it raised no new ques tion from that raised in the first motion to remove and did no draw into issue the validity of any law or statute. In passin upon this point, in the Supreme Court of the State of Arkansas Mr. Chief Justice Hill, who rendered the opinion, cited th above authorities, together with *Telluride Power Transit Co.* v *R. G. W. Ry.*, 182 U. S., 569; and used the following language

"In view of the foregoing decisive settlement of th matter, the court did not consider it as a question properl

for its decision and expressed no opinion on the right of removal, and expresses none now. Attention is called to the fact that there was a second petition for removal which the State Court denied. If there had been any change in the removable nature of the suit after the cause was remanded, then a question addressing itself primarily to the State Court would have been presented and its decision reviewable, and the decision of this court reviewable by writ of error to the Supreme Court of the United States, but such was not the case. The original complaint alleged 'that plaintiff's cause of action arises under an act of Congress and in the trial of said cause, there will be a controversy as to the construction of said act of Congress. * * * After the remanding of the cause to the State Circuit Court, the plaintiff amended the first clause above quoted, so as to make it read as follows: That plaintiff's cause of action arises under an act of Congress, and in the trial of said cause there will be a controversy as to said act of Congress, and that in the trial of this cause the said act of Congress will have to be construed by the court and there will be a controversy as to the construction of said act of Congress'; appellant says: 'after the cause was remanded from the United States Court at Fort Smith to the Crawford Circuit Court for trial, then the plaintiff amended his complaint, and charged that his cause of action arose under the safety appliance act of Congress, and that it would be necessary for the court to construe the safety appliance act of Congress, during the further progress of the cause! All of this is true, but the complaint before amendment showed exactly the same thing and the amendment was trival and neither added to nor took away anything. Whether it was a Federal question was just as clearly in the complaint as it was after the amendment, and the Federal Circuit Court decided it was not a Federal question and that decision is not reviewable here." (Printed Record, pp. 149-150.)

In conclusion we submit that upon this record and authorities herein cited, that this cause should be dissmissed for want of jurisdiction. If this motion to dissmiss is denied then we

respectfully submit that it is clearly manifest from the record that the question upon which the jurisdiction of this court depends is so frivolous as not to need further argument, and that it is apparent from the record that the writ of error was taken for delay only.

Respectfully submitted,

SAM R. CHEW,
Attorney for Defendant in Error.

Supreme Court, U. S.
FILED
APR 3 1908
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 201

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR.

vs.

MAY TAYLOR, ADMINISTRATRIX IN SUCCESSION OF THE ESTATE OF GEORGE W. TAYLOR, DECEASED, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

SAM R. CHEW,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

St. Louis, Iron Mountain & Southern Ry. Co. - - - - Plaintiff in Error,

vs. No. 201

May Taylor, Administratrix in Succession of the Estate of George W. Taylor, deceased, - - Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

Defendant in error recovered judgment in the Circuit Court of Crawford County, Arkansas, against plaintiff in error in this cause, on account of injuries resulting in the death of plaintiff intestate.

Defendant in error alleged in her compalint that plaintiff in error had failed to comply with the Safety Appliance Act of March 2, 1893.

The cause was removed to the federal court on petition of plaintiff in error, and was afterwards remanded to the state court on motion of defendant in error.

Defendant in error recovered judgment against plaintiff in error in the state circuit court, which judgment was affirmed in the Supreme Court of Arkansas, and the plaintiff in error sued out a writ of error to this court under Section 709 of the Revised Statutes of the United States.

Defendant in error's action was based on the Safety Appliance Act, and she claimed under the provisions of that act that plaintiff in error was liable to her in damages. The state court sustained the validity of the act and granted defendant in error relief thereunder.

Defendant in error claims that this court has no jurisdiction to review the judgment of the state court herein.

We call the court's attention to the fact that plaintiff in error seeks the jurisdiction of this court upon two propositions only, which are, that the act of congress putting into force and effect Chapter 119 of Mansfield's Digest of the Statutes of Arkansas in the Indian Territory, and the act of congress of March 2, 1893, will have to be construed in this cause.

The fact that an act of congress may have to be construed in the progress of the trial of a law suit, in order to determine the relative rights of the litigants, raises no federal question, and does not draw into question the validity of the act, and confers no jurisdiction upon this court. The plaintiff and defendant are and were both citizens and residents of the State of Arkansas, and if this court has jurisdiction it must take same under Section 709 of the Revised Statutes. The authority of this court to review a judgment of a state court under that section depends upon the following conditions: First, there must be drawn into question

the validity of a treaty or statute of, or an authority exercised under a treaty or statute of the United States, and the decision of the state court must be against their validity; or second, there must be some title, right, privilege or immunity claimed under the constitution or treaty or statute of the United States, and the decision is against the right, title, privilege or immunity especially set up or claimed under such constitution, treaty, statute or authority.

Taylor on Jurisdiction and Procedure of United States Supreme Court, Section 183.

Many federal questions arise in cases pending in the state courts, and these courts have authority to decide such cases and it is their duty to do so. It is ony when a state court, in construing a federal statute, denies a federal right that the Supreme Court of the United States has jurisdiction to review its judgment.

A decision of a state court which does not question the validity of an act of congress, nor deny any right claimed under it, does not present a federal question.

Ib., Section 190.

In this case the validity of no treaty or statute of the United States was drawn into question, nor was the decision of the state court against the validity of any treaty or statute of the United States. Both of the above conditions must affirmatively appear from the record before this court can review a judgment or decree of the highest court of a state.

The validity of no statute is drawn into question in this

cause by plaintiff in error, but on the contrary, its answer and petition concedes the validity of the acts of congress, and claim that such acts must be construed. Should we concede that the validity of the acts of congress were questioned, still the state court sustained their validity and granted relief under said acts.

The allegations of the complaint, answer and motion to remove to federal court, raising the federal question, were as follows: The complaint stated "There will be a controversy on the construction of said act of congress, and the said act of congress will have to be construed by the court." In the petition to remove to the federal court, defendant in error stated "That it will be necessary to construe a certain act of congress of March 2, 1893, * * * * * It will be necessary for the court to determine whether or not the defendant, under the terms and provisions of this federal law, and the action of the Interstate Commerce Commission, a federal creation deriving all its powers from federal law, was negligent as alleged in plaintiff's complaint."

By these allegations the validity of the acts is admitted, and the facts that the acts have to be construed, if, indeed they would have to be, in the progress of this cause, raise no controversy and does not question the validity of the acts. If they did question the validity of the acts, then we submit that the decision of the Supreme Court of the State of Arkansas is not against their validity. And for that reason, if no other, this court can take no jurisdiction of this cause by writ of error.

The court, speaking through Mr. Justice Brewer, on the

question of jurisdiction on writ of error has used the following strong language:

"It is the settled law of this court that to give it jurisdiction of a writ of error to a state court, it must appear affirmatively not only that a federal question was presented to that court for decision, but also that the decision of the question was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the federal laws or constitution."

Snell et. al. vs. City of Chicago, et. al., 152 U. S., 193-195.

Miller vs. Swann, 150 U. S., 132.

Eustis vs. Bowles, 150 U. S., 361, and authorities cited therein.

Again, we submit that before this court can obtain jurisdiction on a writ of error from the highest court in the state, it is positively necessary that the validity of a federal statute must be drawn into question and that question decided adversely to the party setting up any rights or privileges under the federal statute. When no such grounds have been presented to or considered by the courts of the state, it can not be said that the courts have disregarded or refused to hold a federal statute valid.

Scudder vs. New York, 175 U. S., 32.

Columbia Water Power Co. vs. Columbia Electric Street Car Company, 172 U. S., 475.

This court has long since held that where a state law is admitted to be valid and the only question is whether it has been corrcetly construed gives this court no jurisdiction.

2 Black (U. S.), 474.
12 How. (U. S.), 59.
5 How. (U. S.), 343.

In the case at bar the state court did not question the validity of any act of congress nor deny any right claimed under such act, but on the contrary held the act of congress to be valid and adjudicated the rights of the parties thereunder. The validity of a statute is not drawn in question within the meaning of this section because rights claimed under said statute are controverted.

Cook County vs. Calumet Co., 138 U. S., 635.

So where the decision of a state court did not deny the validity of any statute of the Uinited States, but denied the existence of the facts necessary to bring the case within its operation, the supreme court has no jurisdiction.

Cameron vs. U. S., 146 U. S., 533.

It is only where the validity of an act of congress or some right occurring thereunder is denied that the federal courts have the right to review the decision of the state court. The state court in this case did not deny the validity of any federal statute or deny plaintiff in error any rights or privileges under said statute, but on the contrary upheld the statute in toto. The validity of a statute is not drawn in question within the meaning of this section because plaintiff in error controverted defendant in error's right to recover under the statute.

Kennard vs. Nebraska, 186 U. S., 304.

Florida Centr. vs. Bell, 176 U. S., 321.
Blackburn vs. Portland Mining Co., 175 U. S., 571.

This court has no authority to review a decision of the state court where such state court decides in favor of the validity of the statute or of the authority exercised under the United States, which is drawn in question, in the litigation, as was the case here.

Baker vs,. Baldwin, 187 U. S., 61.

Where the question is not as to the validity but as to the exercise of authority under the United States a federal question is not presented.

Walsh vs. Columbus R. Co., 176 U. S., 469.

And where the issue is as to the validity of the authority but the decision is not against such validity the federal question is not presented.

Baltimore R. Co. vs. Hopkins, 130 U. S., 210.

It is not sufficient that the state courts should have denied the validity of a right set up under the statute. The court must have denied the validity of the statute itself.

Daniels vs. Fearney, 122 U. S., 415.
Bartlett vs. Lockwood, 160 U. S., 357.

The decision of the Supreme Court of Arkansas in this case merely *construed* these acts of congress, and in no wise denied their validity.

In Snell vs. Chicago, 152 U. S., 191, the court said, a decision of the state court arising upon the construction and

not upon the validity of the statute does not present a fe
eral question.

In order to give the supreme court jurisdiction in th
class of cases the right, title or immunity, which is denie
must grow out of the constitution, treaty or statute of t
United States relied upon.

Miller vs. Lancaster Bank, 106 U. S., 542.

Where the successful party asserts a right under a fe
eral statute which is sustained by the state court, the unsu
cessful party cannot remove the case to the United State
Supreme Court upon the ground that he has been denied
right, title or privilege by the state court.

DeLamar Mining Co. vs. Nesbit, 177 U. S., 523.
Rae vs. Homestead Co., 176 U. S., 121.

So, in the case at bar, the only question presented
the construction of a federal act or acts, and whether the
have been correctly construed or not, we submit gives th
court no jurisdiction. It is only contended that a corre
construction of the acts of congress will result in findin
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175 U. S., 639.
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This court, speaking through Mr. Justice Fuller, said:

"We have repeatedly held that the validity of a statute is not drawn into question every time rights claimed under such statutes are controverted, nor is the validity of an authority, every time an act is done by such authority, is disputed."

Ferry vs. County of King, 141 U. S., 668-678.

Again this court said: "The fact that the suit may have been brought under a federal statute or for the purpose of asserting a right under a federal statute, does not raise a federal question, so as to authorize a writ of error."

McMillians vs. Mining Company, 197 U. S., 343.

The act of March 2, 1893, has been by this court construed in the case of Railway Company vs. Carson, and there held to be valid.

194 U. S., 907.

We submit, that if the validity of this act has been properly raised or put in issue, then the fact that the act had been construed by this court, and held to be valid, as it has been, then there is not and can not be any further controversy as to its validity, and can form no basis for a writ of error to this court.

Leonard vs. Vicksburg Railway Company, 198 U. S., 416.

The record in the case at bar affirmatively shows that this cause on motion and pettion of plaintiff in error was removed from the state court to the United States Circuit Court in and for the Western District of Arkansas, Fort Smith Division; and on motion of defendant in error by that

court remanded to the state court, for trial (vide printed record, pp. 10, 12 and 13.)

"If the circuit court remands a cause and the state court thereupon proceeds to final judgment, the action of the circuit court is not reviewable on a writ of error to such judgment. A state court can not be held to have decided against a federal right, when it is the federal court and not the state court which has denied its possession. * * * And, under the statute, a remanding order of the circuit court is not reviewable by this court on appeal or writ of error, from or to that court. So it would seem to follow that it can not be reviewed on a writ of error to a state court. The prohibition being 'no appeal or writ of error from the decision of the circuit court, remanding such cause shall be allowed,' and it is entirely clear that a writ of error can not be maintained under Section 709 in respect of such an order, where the state court has rendered no decision against the federal right, but simply accepted the conclusion of the circuit court."

Nelson vs. Moloney, 174 U. S., 164-169.

Missouri Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556-582.

It is urged by plaintiff in error that it was denied its right of removal upon its second petition; to which we respond that the question of removal became res adjudicata when the United States Circuit Court remanded the cause to the state court, because the second petition is as void of any federal question as was the first petition. In fact, it raised no new question from that raised in the first motion to remove and did not draw into issue the validity of any law or statute. In passing upon this point, in the Supreme Court of the State of Arkansas, Mr. Chief Justice Hill, who rendered the opinion, cited the above authorities, together

with Telluride Power Transit Co. vs. R. G. W. Ry., 182 U. S., 569, and used the following language:

"In view of the foregoing decisive settlement of the matter, the court did not consider it as a question properly for its decision and expressed no opinion on the right of removal, and expresses none now. Attention is called to the fact that there was a second petition for removal which the state court denied. If there had been any change in the removable nature of the suit after the cause was remanded, then a question addressing itself primarily to the state court would have been presented and its decision reviewable, and the decision of this court reviewable by writ of error to the Supreme Court of the United States, but such was not the case. The original complaint alleged 'that plaintiff's cause of action arises under an act of conrgess and in the trial of said cause there will be a controversy as to the construction of said act of congress. * * *' After the remanding of the cause to the state circuit court, the plaintiff amended the first clause above quoted,so as to make it read as follows: That plaintiff's cause of action arises under an act of congress, and in the trial of said cause there will be a controversy as to said act of congress, and that in the trial of this cause the said act of congress will have to be construed by the court and there will be a controversy as to the construction of said act of congress; appellant says: 'After the cause was remanded from the United States Court at Fort Smith to the Crawford Circuit Court for trial, then the plaintiff amended his complaint, and charged that this cause of action arose under the safety appliance act of congress, and that it would be necessary for the court to construe the safety appliance act of congress, during the further progress of the cause.' All of this is true, but the complaint before amendment showed exactly the same thing and the amendment was trivial and neither added to nor took away anything. Whether it was a federal question was just as clearly in the complaint as it was after the amendment, and the federal circuit court decided it was not a federal question and that decision is not reviewable here." (Printed Record, pp. 149-150.)

Plaintiff in error asserts that a federal question is involved, giving this court jurisdiction, for the reason that by an act of congress dated May 2, 1880, a part of the statutes of Arkansas, embracing a modified form of Lord Campbell's Act, was put in force and extended over the Indian Territory. It is argued that, as the common law prevailed in the Indian Territory prior to this act of congress extending the laws of Arkansas over said Territory, therefore, the cause of action arose under an act of congress which gives this court jurisdiction. The contention is without merit. The action was purely transitory. If the defendant was liable in the Indian Territory for its default or negligence, it was liable in any jurisdiction where service could be had upon it. By force of comity, a liability incurred in the Indian Territory could be enforced in any state where the defendant could be found. This is especially true as to the State of Arkansas, as the law in force in the Indian Territory, creating the liability, was the identical act then and now in force in the State of Arkansas.

The Supreme Court of Arkansas has repeatedly held defendants liable for similar torts committed in the Indian Territory.

St. Louis, Iron Mountain & So. Ry. Co. vs. Brown, 62 Ark., 254.

Kansas City Southern Ry. Co. vs. McGinty, 88 S. W., 1001.

St. Louis, Iron Mountain & So. Ry. Co. vs. Brown, 67 Ark., 295.

"An administrator may sue in the District of Columbia for the death of decedant caused by the negligence of an-

other in a foreign state by the laws of which such an action is maintained."

Weaver vs. B. & O. R. Co., 21 D. C., 499.
See also Morris vs. C. R. & P. Ry., 65 Iowa, 727.

Certainly no federal question is involved by the trial of a case in one state that arose under the statute of a sister state or territory.

Though it should be conceded that this action arose under a federal statute, still it does not raise a federal question so as to authorize a writ of error.

McWilliams vs. Mining Co., 197 U. S., 343.

It is also insisted that the Safety Appliance Act of March 2, 1893, is unconstitutional and void, for the alleged reason that congress undertook to delegate the determination of the heighth of the drawbars to the American Railway Association.

We have been unable to find any authority to support this contention. Congress, it is true, can not delegate its legislative power to any association or commission, but it did have the power to confer upon any person or commission the power or authority to ascertain a given question or state of facts that it could not itself readily or intelligently ascertain. In other words, when it conferred upon the American Railway Association the authority to ascertain and designate to the Interstate Commerce Commission the standard for the heighth of drawbars in cars engaged in the carriage of interstate commerce and to fix a maximum variation in the heighth of said drawbars, it conferred upon

this Association none of its legislative or law making power, but a ministerial duty only.

Similar questions have often been before the courts and it has been almost uniformly held that such statutes were valid. A statute conferring authority on a commission to regulate the charges of railroads for transportation of passenger and freight was held to be not a delegation to the commission of the law making power of the legislature.

McWhorter vs. Pensacola Ry., 192 U. S., 470.

An act of the legislature of Minnesota gave the railroad commission of that state authority to determine what are eqaul and reasonable rates over railroads in that state. It was insisted that the legislature had illegally delegated its power to this commission, but the statute was held valid.

State vs. Chicago, M. & St. P. Ry., 38 Minn., 281.

By an act of congress of June 4, 1897, the Secretary of the Interior was given power to make rules and regulations and establish such service as would insure the preservation of certain reservations. In holding this act constitutional, the court said:

"Congress can not delegate its power to make a law, but it can make a law to delegate a power to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action dependent."

Dastervignes vs. U. S., 122 Fed., 30.

See also upon the same point Wymand vs. Southard, 10 Wheat., 15.

Tilley vs. Savannah Ry., 5 Fed., 641.

McCullough vs. Md., 4 Wheat., 316.

Boyd vs. Bryant, 35 Ark., 69.
40 Fed., 402.
83 Fed., 576.
82 Fed., 592.
Dent vs. U. S., 76 Pac., 455.
Field vs. Clark, 143 U. S., 649.

The Supreme Court of Arkansas disposed of plaintiff in error's contention upon this point in the following language:

"Appellant insists that there is no law or act of congress requiring railroads engaged in the carriage of interstate traffic to provide their cars with drawbars of standard height, and fixing a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. The reason given for this contention is that congress has no power to delegate to the American Railway Association the authority to legislate. But no such power was given to the American Railway Association. The act vested it with authority to designate the standard height of drawbars and the maximum variation from such standard height, and, when designated in the manner provided by law, provides that no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with such standard. The authority to designate is given, without the power to give the designation the force or effect of a law. That is derived entirely from the act. When the designation is made, the authority was exhausted. No power to change, amend, enforce, or control exists. The American Railway Association from first to last is without any legislative authority whatever. Such legislation has frequently been sustained by the courts."

We believe that this court has no jurisdiction to review the judgment of the state court herein, and for that reason deem it unnecessary to discuss at length the facts or the law pertaining to the liability of the plaintiff in error.

As shown by the pleadings and proof, George Taylor, the deceased, was a young man 26 years of age, and at the time of his death was acting as brakeman upon one of the trains of the plaintiff in error, running from Van Buren, Arkansas, through Indian Territory to Coffeyville, Kansas. The train in connection with which the injury happened, was a through freight and had been made up at Van Buren, Arkansas, on the morning of the accident and had proceeded to Sallisaw, Indian Territory, a station about 28 miles from Van Buren. The car with the defective drawbar was loaded with lumber or shingles and was on its way from Arkansas to Kansas.

Earl Witt, one of the brakemen in the crew, testified that it took about an hour and a half to run from Van Buren to Sallisaw, and that nothing unusual happened on the trip prior to the death of Taylor. Van Buren was a division point on the road, and plaintiff in error kept a yardmaster and car inspector at that point; that he had testified in the case before, and that the drawbar on one of the cars that deceased was attempting to couple was about four inches higher than the drawbar on the other car, and that in his opinion the drawbar on one car was four inches higher than that on the other car. (R. 36.)

Charles Lattin testified that he was the conductor on the train by which deceased was killed; that only one stop was made between Van Buren and Sallisaw, and that stop was at Cherokee for the purpose of registering; that nothing unusual or out of the ordinary occurred between Van Buren and Sallisaw. (R. 41.)

Joe Curtis testified that he was the yardmaster of plain-

tiff in error at Van Buren at the time of Taylor's death, and that he had made up the train by which Taylor was killed. That car which deceased was attempting to couple had what was known as an old style drawbar, that is not an automatic coupler, and that this old style drawbar was three or probably four inches too high. That, while making up the train, they had had trouble in effecting a coupling with another car at Van Buren that day.

That they had to make several attempts before they could secure the coupling at Van Buren that day with this car, and finally had to block up the drawbar of the car to which this defective car was coupled. (R. 63.)

The proof is clear that deceased was caught between the cars and crushed to death on account of a defective drawbar; one drawbar being so high that it passed over the other, permitting the ends of the cars to come together, thereby crushing deceased.

Plaintiff in error complains that there is no evidence that it had notice of this defective car, or that the defect did not occur after the train left Van Buren. This was a through train and had only run 28 miles after leaving Van Buren. Nothing unusual or out of the ordinary had happened. When the train raeched Sallisaw, the proof shows that one drawbar was four inches too high. Nothing could possibly have happened on this short trip to have caused the drawbar to rise four inches. Plaintiff in error's own yardmaster testified that the car was defective, the drawbar being three or four inches too high, when it was put in the train at Van Buren only an hour and a half before the injury.

Plaintiff in error states that the trial court erred in some of its instructions to the jury. The record shows that the court gave eight instructions on its own motion, and refused thirty-one instructions requested by the plaintiff in error. Plaintiff in error, in its brief, sets out only one of the instructions given by the court. An examination of the record will show that the eight instructions given by the court, taken as a whole, fully and correctly presented the law of the case to the jury.

Plaintiff in error also insists that if it be admitted that the drawbar was defective, still there is no proof that the plaintiff in error had any notice of the defect, and that the court erred in its instruction to the jury upon that point. This same question was directly raised in the Supreme Court of South Carolina and later on writ of error in this court in the case of Carson vs. Southern Railway Co. In that case this court said:

"The trial court in one of its instructions set forth this provision (act of congress, March 2, 1893), told the jury that if they found the Railway Company was engaged, and these cars were being used in interstate traffic, and that they were not equipped with the automatic couplers required, such failure was negligence, and it was further charged that railroads were required to keep their appliances in safe and suitable order. It is objected that the instructions assumed that if the automatic coupler was out of repair the company failed to comply with the act of congress, but we do not think so, and the supreme court held there was no error, as congress must have intended that the couplers should be kept in proper repair for use." (194 U. S., 136.)

In United States vs. Atlantic Coast Line Railway Co., 153 Fed. Rep., 918, in construing this same act, the court said:

"It is not incumbent on the plaintiff to allege and prove that the defendant had not used due care or ordinary diligence in making an inspection or in repairing such defects as their inspection may have disclosed; the purpose of the statute being to make a railroad company liable unconditionally for its violation."

In United States vs. Southern Railway Co., 135 Fed. Rep., 122, the court said:

"Where it is shown that defendant hauled over its line and used in interstate traffic a car on which the safety coupler was broken, and which could not be uncoupled without the necessity of men going between the ends of the cars, it is not a defense that defendant exercised reasonable care and diligence to keep the coupling apparatus on its cars in repair."

To the same effect, see United States vs. Great Northern Railway Company, 150 Fed. Rep., 229.

We most respectfully submit:

First, that the record shows that this court has no jurisdiction, and that the writ of error should therefore be dismissed.

Second, if the court has jurisdiction, then the record shows no reversible error, and the cause should be affirmed.

SAM R. CHEW,
Attorney for Defendant in Error.

Office Supreme Court, U. S.
FILED
APR 9 1908
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

—vs.—

MAY TAYLOR, Administratrix in succession of the Estate of GEO. W. TAYLOR, deceased,
Defendant in Error.

October Term, 1907.

No. 201.

Supplemental Brief and Argument for Plaintiff in Error.

LOVICK P. MILES,
Attorney for Plaintiff in Error.

JOHN F. DILLON,
RUSH TAGGART,
For Plaintiff in Error.

Stewart Carroll Jr. Co., Printers, 121 Water St.

IN THE

Supreme Court of the United States

St. Louis, Iron Mountain and Southern Railway Company, Plaintiff in Error, *vs.* May Taylor, Administratrix in Succession of the Estate of Geo. W. Taylor, Deceased, Defendant in Error.	No. 201.

Supplemental Brief and Argument for Plaintiff in Error.

Supplemental to the abstract, brief and argument for plaintiff in error, heretofore filed in the above entitled cause, the plaintiff in error begs leave to submit the following additional suggestions, in support of its contentions in this cause.

THE CONSTRUCTIONS OF THE ACT OF MARCH 2, 1893, CONTENDED FOR BY PLAINTIFF IN ERROR AND DENIED BY THE TRIAL COURT AND THE SUPREME COURT OF ARKANSAS, BRING THIS CAUSE WITHIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

"Where it appears that some title, right privilege or immunity on which the recovery in a cause depends

> will be defeated, by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the Supreme Court of the United States will take jurisdiction of a cause brought to it upon writ of error to the supreme court of a state."

The foregoing is a general declaration found in "Jurisdiction and Procedure of the United States Supreme Court," by the Hon. Hannis Taylor, page 364; and the learned author cites, in support of this announcement, *Starin* vs. *New York,* 115 U. S., 248.

By reference to the case cited, we find the following declaration and citations in the opinion of Chief Justice Waite:

> "We will first consider whether the suit is one which arises under the constitution or laws of the United States. . . . . The character of a case is determined by the questions involved. *Osborn* vs. *Bank of U. S.,* 9 Wheaton, 824. If, from the questions, it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise, not. Such is the effect of the decisions on this subject. *Cohens* vs. *Virginia,* 6 Wheaton, 279; *Osborn* vs. *Bank of U. S.,* 9 Wheaton, 824; *The Mayor* vs. *Cooper,* 6 Wall., 252; *Gold Washing & Water Co.* vs. *Keys,* 96 U. S., 201; *Tennessee* vs. *Davis,* 100 U. S., 264; *Railroad Co.* vs. *Mississippi,* 102 U. S., 140; *Ames* vs. *Kansas,* 111 U. S., 462; *Kansas Pacific* vs. *Atchison R. Co.,* 112 U. S., 416; *Provident Savings Society* vs. *Ford,* 114 U. S., 641; *Union Pacific Railroad, Removal cases,* 115 U. S., 11."

After announcing the general rule as hereinbefore stated by the Supreme Court of the United States, it is but necessary to call attention to the conflicting constructions of the act of March 2, 1893, sought for by the plaintiff in error, on the one hand, and denied by the court, upon the other; and the constructions of this act given by the court in the trial of this cause, to demonstrate conclusively that the cause is now within the jurisdiction of the Supreme Court of the United States.

The basis of the hope for recovery by the defendant in error, was the alleged violation of the requirements of the act of March 2, 1893, relative to the equipment of cars engaged in interstate commerce with draw-bars of standard height.

If there was no violation of this act, by the plaintiff in error, then it was conceded there was no ground alleged in the complaint upon which the defendant in error could recover. There were three constructions of this act involved in the litigation.

First: The trial court declared that the standard height of loaded cars, engaged in interstate commerce, was 31½ inches, and of unloaded cars, was 34½ inches. "*Measured perpendicularly from the level of the face of the rail, to the centers of the draw-bars*" (R. 120). This declaration presented the court's construction of the act, as to what was meant by standard height—that is, the manner in which it should be measured.

Plaintiff in error sought to have the act construed, and the court's instruction modified, so as to show its construction, in its request No. 24, as follows: "By center of the draw-bar is meant the center of the draw-bar shank, or the center

of the draft-line of the draw-bar." This construction the court refused to adopt.

The plaintiff in error, in its 25th request, also asked the court to declare that "by standard height is meant from 31½ inches to 34½ inches, measured perpendicularly from the face of the rail to the *center of the draft-line in the draw-bar.*" And the court refused to adopt this construction.

Plaintiff in error again, in its request No. 26, asked the court to declare that "cars are of uniform and standard height when the *centers of the draw-bar shanks* are not less than 31½ inches, nor more than 34½ inches, measured perpendicularly, above the face of the rail." And the court refused to adopt this construction.

Second: It was sought by the plaintiff in error to have the act of Congress construed to mean that there could be a variation of three inches in height in the draw-bars of cars engaged in interstate commerce, regardless of whether the cars were loaded to capacity, partially loaded or empty. The trial court declared (R. 120):

> "The act of Congress fixes the height of standard cars engaged in interstate commerce, on standard-gauge railroads, at 31½ inches, and unloaded cars, at 34½ inches . . . . and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now, the law requires that the two cars between which Taylor lost his life, *should be when unloaded, of the equal and uniform height, from the level of the face of the rail to the center of the draw-bars, of 34½ inches, and, when loaded to full capacity, to be of the uniform height of 31½ inches.*"

The plaintiff in error, in its 27th request, asked for the following instruction, which, it is contended, would have properly construed the phase of the act of Congress involved.

> "The court charges you that the act of Congress allows a variation in height of three inches between the centers of the draw-bars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the center of the draw-bar shank or draft line."

The plaintiff in error, in its 28th request, asked the court for the following construction:

> "The court charges you that when one car is fully loaded, and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centers of the draw-bars of such cars, without regard to the amount of weight in the partially loaded cars."

And the court refused to grant either or both of requests 27 and 28 (R. 127).

Third: The conflict as to one feature of the construction of the act of 1893, which has been almost continuous, in the federal courts, since the enactment of this law, and which has not yet been settled by the Supreme Court of the United States was raised in the trial of the cause now under consideration. The trial court declared it to be the absolute duty of the railway company to have its draw-bars of the uniform and standard height prescribed. This construction and attitude of the trial court appears in its instruction No. 1 (R. 120), as follows:

"The act of Congress fixes the standard height of loaded cars engaged in interstate commerce on standard gauge railroad at 31½ inches and unloaded cars at 34½ inches, measured perpendicularly from the level of the face of the rails to the centers of the draw bars and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now, the law required that the two cars between which Taylor lost his life should be when unloaded of the equal and uniform height from the level of the face of the rails to the center of the draw bars of 34½ inches, and when loaded to the full capacity should be of the uniform height of 31½ inches. Now, if the plaintiff, by a preponderance of the evidence, shows a violation of this duty on part of defendant, then this is negligence; and if the proof, by a preponderance, also shows that this caused or contributed to the death of Taylor, then you should find for the plaintiff, unless it appears by a preponderance of the evidence that Taylor was wanting in ordinary care for his own safety and that this want of care on Taylor's part for his own safety caused or contributed to the injury and death sued for, in which latter case you should find for the defendant."

The plaintiff in error sought to have the act construed as not imposing the absolute duty upon the plaintiff in error, to maintain its draw-bars at the uniform and standard height, but as imposing upon the plaintiff in error the duty to exercise reasonable and ordinary care to maintain them at such height after such height had been once established. This effort of plaintiff in error appears in the following instructions asked by the plaintiff in error and refused by the trial court (R., pp. 122, 123, 126):

I.

"This action, like all others brought by servant against master, for personal injuries sustained in the course of his employment, is based on actual negligence in the defendant, or in those who represent it. The presumption is that the master has done his duty by furnishing safe and suitable appliances for the performance of his work, and when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the master had no notice of the defect and was not negligently ignorant of it. It is not sufficient to show that the employee was injured and that the injury resulted from a defect in the machinery, but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises."

III.

"As between a railroad company and its employees, the railroad is not an insurer of the perfection of any of its machinery, appliances or instrumentalities for the operation of its railroad."

IV.

"As between a railroad company and its employees, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of its rail road."

V.

"It will be presumed in the absence of anything to the contrary that a railroad company performs its duty in such cases and the burden of proving otherwise will

rest upon the party asserting that the railroad company had not performed its duty."

VI.

"And where an employe seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employe to prove such insufficiency, but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections or insufficiencies complained of, or that by the exercise of reasonable or ordinary care and diligence it might have obtained such notice."

VIII.

"As between a railroad company and its employes, the railroad company is not necessarily negligent in the use of defective machinery nor obviously defective, and it is negligent in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them and in remedying them."

XXII.

"If you find from the evidence in this cause that, although a draw-bar may be adjusted to the standard height when the car is first built and turned out of the shop, that the every day wear and tear of the car continually lowers the draw-bar—that the defendant in order to provide against this constant lowering of the draw-bar, provided an ample supply of shims ready to the hands of the trainmen and car inspectors which may be readily and in a very short time placed under

the draw-bars so as to restore them to uniform and standard height, then the court tells you that the master has fully performed its duty, and if there was any failure of the trainmen, switching crew or car inspectors to use these shims so provided, such failure was the failure of a fellow-servant with the deceased, and you should find for the defendant."

XXIII.

"The court tells you that if you find from the evidence in this case the defendant equipped all its cars with uniform and standard height draw bars when such cars are first built and turned out of the shops, then the defendant is only bound to use ordinary care to maintain such draw-bars at the uniform and standard height spoken of in the testimony."

Fourth: The plaintiff in error sought to have the act of March 2, 1893, so construed that upon the evidence adduced at the trial of the cause the plaintiff in error would not be held liable to the defendant in error for any sum whatsoever. This effort of plaintiff in error is reflected in its request 22, *supra,* and in its request for a verdict in its favor at the conclusion of the testimony in the cause.

Having hereinbefore set out the conflicting constructions of the act sought by the plaintiff in error, and those given by the trial court, the latter being sustained by the supreme court of Arkansas, the next question is, had the constructions sought by plaintiff in error been adopted, would the results of the trial either have been, or probably would have been, different?

1st.—As set out in the original brief for plaintiff in error, page 26, the tenth annual report of the interstate commerce

commission, of 1896, recognized the fact that there had been a wide misunderstanding among some of the carriers as to the precise meaning of the language used by the American Railway Association, in fixing the standard height of draw-bars, and the variation to be allowed therefrom as between empty and loaded cars. Recognizing this misunderstanding and the necessity of construing clearly the act, the interstate commerce commission sought an explanation from the American Railway Association, and promulgated this explanation through its tenth annual report.

The act having been thus construed, it was the duty of the trial court to so construe the act, and, had the trial court so construed the act as requested by plaintiff in error, its construction would have been in accord with that of the American Railway Association, and the Interstate Commerce Commission; and, in that event, the defendant in error would have lost the cause. It was not within the province of the trial court of the state of Arkansas to adopt another standard for draw-bars in cars engaged in interstate commerce, when that standard had been fixed, it is contended, by act of Congress. Therefore, we find the plaintiff in error as a result of the refusal of the court to construe the act as contended by it, and as fixed by the Interstate Commerce Commission, in the attitude of being defeated by the construction adopted by the trial court, whereas, it would have been sustained had the opposite and correct construction been adopted. And we find the plaintiff in error further confronted with a law-suit wherein its correct decision depended upon the correct construction of the act of March 2, 1893.

Cohen *vs.* Virginia, *supra.*
Osborn *vs.* Bank of U. S., *supra.*

2nd.—Proceeding with the argument, and referring now to the second alleged wrongful construction of the act, wherein the court held that the variation provided for applied only to cars loaded, unloaded, or partially loaded, and to the construction contended for by the plaintiff in error that the variation was intended to apply to cars, regardless of whether they were loaded, unloaded, or partially loaded. The supreme court of Arkansas recognized that the trial court erred in not giving its instruction embodying the construction of the law against which plaintiff in error now protests, and the supreme court of Arkansas admitted that the 28th instruction asked by plaintiff in error probably should have been given, or should have been given, since it would have presented the correct construction of the act of March 2, 1893, in the respects mentioned.

As is very aptly stated in the opinion of the supreme court of Arkansas, in this case, it is impracticable to construct and maintain at all times freight cars of uniform and standard height, the difficulty arising from the many conditions with which such cars are met during their service, and therefore the just and sensible construction of the act of March 2, 1893, is that it provides a variation of 3 inches in the height of draw-bars, regardless of whether they are loaded, partially unloaded, or unloaded.

We respectfully submit that, though the supreme court of Arkansas held that it was not prejudicial error to refuse the specific construction of the act contended for by plaintiff in error, or that plaintiff in error presented its request for this instruction along with a large number of other requests, and therefore was not entitled to it, yet, where the correct decision of a case depends upon the correct construction of

an act of Congress, and the Supreme Court of the United States has jurisdiction, it is within the province of this court to reverse the cause and insist that the correct construction of the act of Congress be explicitly given to the jury, in a subsequent trial of the cause, to the end that a correct decision of the cause may be reached, and that justice may be made certain.

It was admitted by Chief Justice HILL and Mr. Justice MCCULLOCH, in the majority opinion of the court, that the construction given by the trial court of the act in this regard, was not as clear as might have been; Justices Riddick and Wood concurring, declared that the instruction seemed to lack clearness; that they were to some extent involved and confused, and they are not quite sure that they were not misleading; and they also express the opinion that had the 28th instruction asked by defendant, which was a direct and correct statement of the law, been given, the meaning of the court would have been made some clearer.

If the Chief Justice and Justice McCulloch express the views they do, relative to this construction of the court, and Justices Riddick and Wood indulge in the expressions which they promulgate, while Justice Battle dissents entirely, and insists with such good reason that the instruction was clearly erroneous, does it not seem more than probable that a jury of laymen, engaged in the trial of this cause, would have gone far wide of an appreciation of the laws, when learned members of the supreme court, after a long period of study, reflected such a confused, hesitating and dubious attitude as to the meaning of the court?

We respectfully submit that this act of Congress should have been construed clearly by the trial court to the end that a correct decision might be insured; and we respectfully

submit that it is within the jurisdiction of this court to so declare at present, and to reverse and remand this cause for a trial because of this gravely prejudicial error.

3rd.—Since the act of March 2, 1893, became a law, there has been, as suggested hereinbefore, a continuous controversy as to its proper construction with respect to the duty imposed upon the interstate carriers. On the one hand, it has been contended that it is of no consequence that the carrier has at some time previously, no matter how near, put its equipment in perfect condition, under the provisions of the act, and thereafter has exercised due diligence and ordinary care to preserve its equipment in such perfect condition, it cannot escape liability to an injured servant, in the event such equipment, at the time of an accident, is not in the condition prescribed by the act of Congress. In other words, on the one hand it is contended that the act of Congress made the carrier an absolute insurer of the condition of its equipment at all times, and at all places, and under all circumstances, in accord with the provision of the act of Congress.

On the other hand, the contention has been that the carrier has complied with its duty to the government, and to its employes, if it equips its cars with the prescribed drawheads or coupling apparatus, and thereafter uses due diligence in endeavoring to keep them in the condition prescribed by the act.

These conflicting contentions as to the construction of the act, were presented squarely to the trial court. The trial court read and accepted literally the act, and construed it to impose the absolute duty mentioned in the first contention referred to; whereas, plaintiff in error sought, in its instructions asked and refused by the court, Nos. 1, 3, 4, 5, 6, 8, 22,

and 23, respectively, to have the other construction placed upon the act so that it might be relieved of liability should the jury find that it had discharged its duty in equipping, originally its cars as prescribed by the act, and thereafter exercising due diligence and ordinary care in maintaining its equipment in the condition prescribed by the act of Congress. The question as to the proper construction of the act in this respect has arisen in the courts in a number of cars, but so far the Supreme Court of the United States has not disposed of the contention. In the following cases, the contention of plaintiff in error has been sustained:

United States *vs.* A. T. & S. F. Ry. Co., 150 Fed., 442;
Voelker *vs.* C. M. & St. P. Ry. Co., 116 Fed.., 867;
United States vs. I. C. R. Co., 156 Fed., 185;
Elmore *vs.* Seaboard Air Line Ry. Co., 41 S. E. Rep., 786;
Missouri Pacific Ry. Co. *vs.* Blinkmeier, Supreme Court of Kansas, not reported.

And in *St. Louis, San Francisco Railroad Co.* vs. *E. M. Delk,* pending in the United States Circuit Court of Appeals, for the Sixth Circuit, a unanimous court, on March 31, 1908, rendered an opinion also sustaining the present contention of plaintiff in error. We beg to submit for the consideration of the Supreme Court of the United States, the concise and clear reasoning which Judge Severens, writing the opinion for the court, follows, in reaching his conclusions. After stating certain rules of construction, Judge Severens says:

"The first rule of construction which occurs is that we are to have regard to the scope and purpose of the statute, not so much the general purpose as the imme-

diate purpose of this particular enactment. For, if we look too closely to some ultimate good we would wish to accomplish we are very liable to distort the law or make out of it some other enactment than that which the legislature has in fact passed. We think the immediate purpose of Congress in this enactment, in the respect we are now considering it, is that disclosed by its title, wherein it is declared to be 'An Act to promote the safety of employes and travelers upon railroads, by compelling common carriers, engaged in interstate commerce to equip their cars with automatic couplers, etc.' The general purpose is to promote the safety of employes and travelers; but the immediate purpose of the Act is to prescribe a way of doing this, namely, by compelling common carriers to equip their cars with automatic couplings. The method or means by which the ultimate good is expected to be accomplished is the subject of the enactment. The safety of employes, etc., is a thing beyond, an expected result of the enactment, which latter is the substantive thing before us for interpretation. True, we should have regard to the result intended for it, but we cannot carry into it words foreign to its meaning, or strain those used beyond their fair import. By this reference to the title to the Act we do not mean that the title is competent to override any express language in the enacting parts, but simply as a clue or an index pointing to the right construction of what follows. It is of the more significance in that, instead of using general language, it specifically signalizes the very purpose of the act and embraces the whole of it, differing in this respect from the class of statutes which Mr. Justice Field was considering and instanced in Haddon *v.* Berney, 5 Wall., 107, where subjects of legislation were so heterogenous it could not be expected that the title would with any reasonable certainty indicate the scope and purpose of the act. To

the extent to which we propose this use of the title we are justified by several decisions of the Supreme Court. United States *v.* Fisher, 2 Cr., 358; Church of the Holy Trinity v. United States, 143 U. S., 457; Coosaw Mining Co. *v.* South Carolina, 144 U. S., 550; Patterson *v.* Bark Eudern, 190 U. S., 169; White *v.* United States, 191 U. S., 546. In Charles River Bridge *v.* Warren Bridge, 11 Pet., 420, at page 611, Mr. Justice Story said:

"The title of the act puts this beyond all controversy; for it is 'an act for incorporating certain persons for the purpose of building a bridge over Charles River, between Boston and Charleston, etc.' But, then, we are told that no rule in constructing statutes is better than that the title of an act does not constitute any part of he act. If, by this, no more be meant, than that the title of an act constitutes no part of its enacting clauses, the accuracy of the position will not be disputed. But, if it is meant to say that the title of the act does not belong to it, for any purpose of explaantion or construction, and that, in no sense is it any part of the act; I, for one, must deny that there is any such settled principle of law. On the contrary, I understand that the title of an act (though it is not ordinarily resorted to) may be legitimately restorted to, for the purpose of ascertaining the legislative intention, just as much as any other part of the act. In point of fact, it is usually resorted to whenever it may assist us in removing any ambiguities in the enacting clauses. Thus, in the great case of Sutten's Hospital, 10 C. 23, 24 b, the title of an act of parliament was thought not unworthy to be examined in construing the design of the act. In Boulton *v.* Bull, 2 H. Bl., 463, 500, the effect of the title of an act was largely insisted upon in the argument, as furnishing a key to the intent of the enacting clauses. And Lord Chief Justice Eyre admitted the propriety of the argument, and met it by saying that in that case

he would, if necessary, expound the word 'engine' in the body of the bill in opposition to the title to it, to mean a 'method' in order to support the patent.'

"When we come to the enactment itself, we find that in the second section it corresponds with what the title has heralded. It forbids the use of cars which have not been equipped with automatic couplers, which are a little more fully defined by adding that they are to be such as will obviate the necessity of going between the cars to uncouple them. And this is all there is of the statute which by direct language imposes the duty upon the carrier in respect to the use of automatic coupling. But it is necessarily implied that the railroad company shall keep up the equipment, for it forbids the use of the cars without it. In this connection it seems proper to refer to the last clause in section 2, which is 'and which can be uncoupled without the necessity of men going between the ends of the cars.' We understand this to be a part of the description of the type of automatic couplings with which the cars must be equipped. And further we may here remark that the coupling with which this car was equipped was of the kind required by the act. Section 6 declares that the use of any car in violation of this provision of the act shall constitute an offence punishable by a fine of one hundred dollars. And Section 8 declares that the employee shall not be deemed to have assumed the risk occasioned by the failure of the railroad company to equip its cars as required by the second section.

"Now, the statutes clearly and positively devolves upon the railroad company the duty of equipping its cars with these couplers and makes it a penal offence to use its cars without them. All this is simple enough. The company could make no mistake about it. But we can find no warrant for imposing such drastic consequences upon the failure of the railroad company to at

all times and under all circumstances have the couplings in repair. One of the recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and another is that it is not to be presumed that the statute was intended to displace the former law whether it be statute or common law, further than was fairly necessary to give it place and operation. Now, prior to this enactment other methods were employed by railroad companies for coupling their cars, generally, if not universally, by a link and pins. And the law was that in respect of this coupling the company was bound to exercise that reasonable degree of diligence in keeping them in repair which was proportionate to the danger of their use. The rule was expressed in various forms, but that was the substance. Conceiving that the new form or method of automatic coupling by impact would mitigate the danger to employes, it enacted this statute to compel the carrier to substitute the new form for the old in operating its cars; and of course it necessarily implied that it shall be done in good faith as is always implied in the enactment of laws. If the carrier does this, it has complied with the requirement of the statute and the old method is displaced by the new. But it is now proposed to add to the obligation of the carrier, by requiring that he shall be bound to see that the substituted coupling shall at all times and places be in good order, a burden well nigh impossible. The coupling apparatus on railroad cars is subject at all times while they are being operated, to almost constant wrench and strain. Much of the time the cars are connected up in trains running on time schedules, and under orders of train dispatchers which must be observed or fatal and disastrous consequences ensue. Moreover, accidents to the couplings or unknown defects appear at places more or less remote from repair shops. It is reason-

able and just to require that the carrier shall exercise a high degree of care to keep the couplings in proper condition. But it seems unjust and unreasonable to say that having fulfilled its utmost duty in this regard, it should be held responsible for conditions which may occur without its fault. We do not say that Congress has not the power to impose such an obligation as it is contended that this statute imposes; but what we mean to say is that if a statute seems to impose obligations so extraordinary and difficult to perform, the court would be bound to see whether the language employed is not susceptible of a more reasonable construction. Undoubtedly there are many cases in the multitude of statutes where the command is so imperative and unconditional that there is no escape from an exact and literal observance. The industry of counsel has accumulated a considerable number of them in his berief. In such cases if the statute is within the power of the legislature, there is, as the phase goes, 'no room for construction' and the business of the court is simply to administer the law as it is written. But this in no wise relieves the court from the duty of construing statutes which are not of that character but are subject to amelioration which the common law affords by its rules of construction. But with regard to this statute, on turning back from the consideration of the consequences to the language employed, we find nothing which in terms imposes such an obligation. It is said to be implied; and the singular result is that instead of shading down the express language of an act so that it shall not have an effect which we cannot suppose to have been intended by the legislature, we should by implication infer an intent which, if seemingly expressed, we should be bound, if fairly possible, to suppose did not exist. Then again the statute is penal. The facts which would be necessary to maintain a criminal prosecution are the same as those which would support a private action.

The only difference would be in the greater certainty with which the facts should be proven. And in the construction of such statutes the court is not justified in extending their operation beyond the plain meaning of the language used into regions of doubt and uncertain implications.

"In this case we do not think it could be held as matter of law that the railroad company was guilty of a violation of the statute. In view of the evidence given at the trial, it was a question for the jury to determine as one of fact whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened."

4th. Referring now to the 4th construction contended for and set out hereinbefore by plaintiff in error. The strength of this contention depends upon the construction of the Act as contended for in the Third subhead. If the Act imposes a duty, first, to equip its cars in accordance with the provisions of the Act of Congress and thereafter to exercise reasonable care to continue the equipment in such condition, then there is no conflict in the evidence as to the discharge of the duty in the master; the testimony, without any contradiction, introduced on behalf of plaintiff in error, showed that the duty imposed by the Act of Congress so construed was discharged by the plaintiff in error, that the duty of the master was fully discharged and if there was any neglect to maintain the draw bars at the uniform and standard height required, such neglect was the neglect of a fellow servant of Geo. W. Taylor, for which the plaintiff in error could not be held liable. This unfortunate accident occurred in the Indian Territory where only the common law regulating the relations and obligations between master and servant was in force. It was not alleged in the complaint, nor proven upon the trial that there was any negli-

gence of the master in constructing originally the cars for the use of Geo. W. Taylor, nor was it contended that there was any negligence of the master in providing shims and other devices for maintaining the drawheads at a uniform and standard height; nor was it contended that there was any negligence of the master in employing its car inspectors, its conductors and its brakemen, who were fellow servants under the common law with George W. Taylor, deceased; and it is affirmatively shown by the testimony of Conductor Latin (Tr. 52, 60 & 61) that the plaintiff in error first furnished him and his brakemen with a supply of shims to maintain draw bars of uniform and standard height; that a supply of these shims were carried in his caboose at the time Taylor was injured and *that it was the brakeman's duty, or conductor's duty, or the duty of whoever happened to notice a draw bar down sufficiently to be out of uniform and standard height to put these shims in, and that it required only from one-half a minute to three minutes to correct the defect.*

If the Act of Congress had been construed as we contend it should have been construed to impose upon the master the duty to exercise ordinary or reasonable care to put its drawheads in and maintain them in the condition prescribed by the Act of Congress, then there was no evidence upon which to base a liability in this cause.

First: Because there was no evidence, we contend, legally sufficient to justify the finding that the drawbars of the cars between which Taylor was crushed were not at the time of the accident of a uniform and standard height within the meaning of the Act of Congress, and

Second: If there was evidence of this defect, when the

neglect to put them in the condition prescribed by Congress was the neglect of a fellow servant of George W. Taylor under the common law, for which neglect the master could not be held liable.

In conclusion, we deem it useless to call attention of the Court to authorities supporting the proposition that the construction of an Act of Congress, wherein a uniformity of construction is essential, is exclusively within the jurisdiction of the Federal Courts. And, in this connection, we can find no case calling more imperatively for uniformity of construction and announcement of the Federal Courts than the Act of March 2nd, 1893. Not only do we see the possibility of State Courts adopting widely varying constructions of this Act, but we see the practice of various constructions of the Act reflected by the Subordinate Federal Courts, for, opposed to the view for which plaintiff in error contends, as to the construction of the Act with reference to the duty it imposes upon the master, we find the following courts holding that the Act imposes absolute duty to equip and maintain at all times, at all places and under all circumstances, the coupling appliances in accord with the provisions of the Act of Congress, to-wit:

United States *vs.* Southern Railway, 135 Fed., 122;
United States *vs.* Northern Railway Co., 150 Fed., 229.

Respectfully submitted,

LOVICK P. MILES.

JOHN F. DILLON,
RUSH TAGGART,
Counsel.

IN THE

Supreme Court of the United States

No. 201

October Term, 1907

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

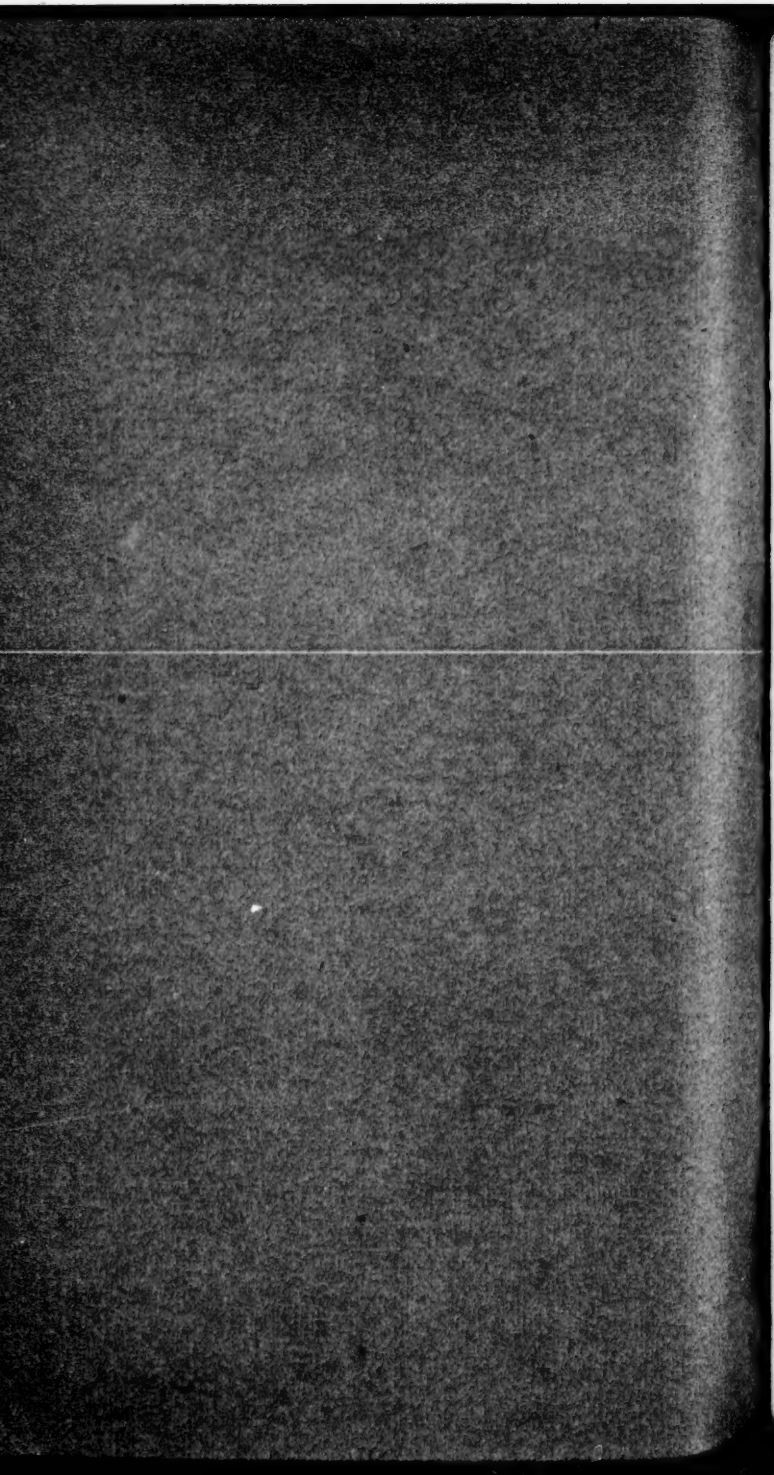
vs.

MAY TAYLOR, ADMINISTRATRIX IN SUCCESSION OF THE ESTATE OF GEORGE W. TAYLOR, DECEASED, DEFENDANT IN ERROR.

ERROR TO SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

John P. [illegible]
Bush [illegible]



IN THE

Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR.

VS.

MAY TAYLOR, ADMINISTRATRIX IN SUCCESSION OF THE ESTATE OF GEORGE W. TAYLOR, DECEASED, DEFENDANT IN ERROR.

This cause is here for re-consideration of a judgment of the Supreme Court of the State of Arkansas, affirming a judgment on appeal to that court by plaintiff in error from the Circuit Court of Crawford County, in the State of Arkansas.

(Record, pp. 138, 148, 149 and 150.)

This action was originally brought to the June Term, 1899, of the Crawford Circuit Court, in the State of Arkansas, by Jonathan Neal, as Administrator of the estate of George W. Taylor, deceased, against the plaintiff in error. The complaint upon which the judgment is based, omitting the heading, reads as follows:

COMPLAINT AT LAW.

"Comes the plaintiff, Jonathan Neal, as administrator of the estate of George W. Taylor, deceased, and for his cause of action against the defendant, St. Louis, Iron Mountain & Southern Railway Company, says: That on the 21st day of February, 1899, the Probate Court of Crawford County, Arkansas, granted him letters of administration upon the estate of George W. Taylor, deceased; and that he is now duly qualified and acting administrator upon said estate; that the said defendant is the owner, in possession of, managing, operating and controlling a line of railway, engaged in interstate traffic, extending from the City of Van Buren, Arkansas, through and across the Indian Territory, to the City of Coffeyville, Kansas. That the town of Sallisaw, Indian Territory, is upon said line of railway; that the plaintiff's intestate, Geo. W. Taylor, was on the 3d day of May, 1892, a citizen and resident of Van Buren, Crawford County, Arkansas, and remained such until the date of his death. That on said 3d day of May, 1892, plaintiff's intestate entered into a contract with the defendant at Van Buren, Arkansas, for the performance of duties as brakeman, upon defendant's trains, running from Van Buren, Arkansas, through the Indian Territory to Coffeyville, Kansas.

"That the plaintiff's cause of action arises under an act of Congress, and in the trial of said cause there will be a controversy as to the construction of said act of Congress.

"That on the 18th day of January, 1899, the defendant, disregarding its duty to plaintiff's intestate, maintained and equipped two of the freight cars in one of its westbound freight trains in so negligent, wrongful, improper, defective and unsafe condition that plaintiff's intestate, at said town of Sallisaw, Indian

Territory, while in the discharge of his duty, as a brakeman, as aforesaid, and while attempting to make a coupling between said two cars, was caught between said cars, mashed, crushed and instantly killed, on account of said wrongful and improper equipment of said two cars, and the negligent, defective and dangerous condition of same; that said cars were wrongfully and improperly equipped, and in a dangerous and defective condition, in this: said cars were not equipped with automatic or safety couplers, the draw bars on said cars were not of even, uniform or standard height, as required by the laws of Congress, 'and that in the trial of this case said act of Congress will have to be construed by the court, and that there will be a controversy as to the construction of said act of Congress.'

"And the draw bars on said cars were faulty, cracked and in an unsafe a l defective condition. That the defenadnt knew, or by an exercise of ordinary care and diligence, could have known of the wrongful, improper and unsafe equipment of said cars, and the dangerous and defective condition thereof (that each of said cars were at the time loaded, and were engaged in interstate traffic); that, on account of the said wrongful, improper and unsafe condition of said cars, and the dangerous and defective condition of same when said cars were pushed together for the purpose of being coupled, one of the draw bars passed over the other, and each of said draw bars became cracked and broken, thereby catching plaintiff's intestate between said cars, crushing and killing him as aforesaid, while in the discharge of his duty, attempting to couple said cars as aforesaid, without any fault or negligence on his part.

"That plaintiff's intestate left a widow, May Taylor, him surviving and William Neal, a son nine years old, and Lorna Doon Taylor, a daughter six years old, and Geo. W. Taylor a daughter one year old, his only

children and next of kin, who were poor and dependent upon him for support. That said children were also dependent upon him for nurture and education; that, on account of said negligence and wrongful acts of defendant, said widow and next of kin have been deprived of their only means of support, said widow has lost the society of her husband; and said children have been deprived of the value of the training and instruction of their father. All to their great damage in the sum of $15,000.00.

Wherefore plaintiff prays judgment against the defendant for said sum of $15,000.00, for the use and benefit of the widow and next of kin, and for the costs of this action.

Record, pp. 1 and 2.)

Upon the filing of the foregoing complaint, in all respects as above printed except that the words "that plaintiff's cause of action arises under an act of Congress, and in the trial of said case there will be a controversy as to the construction of said act of Congress;" and the further words,—"and that in the trial of this case said act of Congress will have to be construed by the Court," were afterwards inserted by way of amendment. The said act of Congress here mentioned, and referred to in the complaint as originally filed, is the Safety Appliance Act of Congress of March 2, 1893. Before filing an answer in the State court the defendant in the case (present plaintiff in error) filed a petition to remove the cause from the State Court to the United States Circuit Court for the Western District of Arkansas, Fort Smith division.

There was a proper bond accompanying this petition to remove, and the state court, having the petition for re-

moval under advisement, made and entered an order, removing the cause from the State Circuit Court, to the United States Circuit Court for the Western District of Arkansas, Fort Smith division.

And after this cause was removed from the State Circuit Court to the United States Circuit Court, defendant in error filed in the United States Circuit Court his motion to remand the cause to the State Court for trial.

This motion was by the United States Circuit Court of the Fort Smith division, of the Western District of Arkansas, sustained, and an order was made and entered of record in the said United States Circuit Court, remanding this cause to the Crawford Circuit Court for trial.

After this cause was remanded to the Crawford Circuit Court for trial, plaintiff in error filed the following motion to dismiss this cause in the Crawford Circuit Court, to-wit:

MOTION TO DISMISS—MOTION OVERRULED.

"The above entitled cause coming on to be heard, the defendant, the St. Louis, Iron Mountain and Southern Railway Company, moved to dismiss said cause from the docket of this court, for the reason that the same is in law and fact pending in the United States Circuit Court for the Western District of Arkansas, Ft. Smith division, and the court, having said motion under advisement, overruled the same; and to the action of the court in this behalf the defendant at the time excepted."

(Printed Record, p. 11.)

This motion to dismiss was by the Crawford Circuit Court overruled, whereupon defendant in error, by leave of the Court amended his complaint as stated above.

After this amendment was made, plaintiff in error filed its second motion to remove to the United States Circuit Court.

There was proper bond accompanying this motion, which is not here set out, as there is no question raised about it.

This second petition to remove to the United States Circuit Court was by the Crawford Circuit Court overruled. An answer in denial was filed (Rec., p. 3). The cause went to trial to a jury, resulting in a verdict and judgment for plaintiff in error. From this judgment defendant in error prosecuted an appeal to the Supreme Court of the State of Arkansas, and this judgment against defendant in error was, by the Supreme Court of the State of Arkansas reversed and remanded for a new trial.

(Record, pp. 14-15.)

After this cause was remanded to the Crawford Circuit Court by the Supreme Court of the State of Arkansas plaintiff in error renewed its motion to dismiss said cause, which said motion is as follows, to-wit:

> "Comes the defendant the St. Louis, Iron Mountain and Southern Railway Company, and protests the trial of this cause in this court for the reason that said cause is only triable in the United States Court at Ft. Smith, Arkansas, and moves the court to dismiss this cause from the docket of this court and to direct that the same be removed to the United States District

Court for the Western district of Arkansas, Fort Smith Division, for trial."

(Record, p. 15.)

This motion was by the Crawford Circuit Court overruled, and defendant excepted. (Record, p. 16.)

Thereupon, this cause went to trial in the Crawford Circuit Court upon its merits, resulting in a verdict and judgment for defendant in error. (Record, pp. 130-131.)

From this judgment plaintiff in error prosecuted its appeal to the Supreme Court of the State of Arkansas. (Printed Record, p. 132.)

During the pendency of this appeal, Jonathan Neal died, and this cause was, by the Supreme Court of the State of Arkansas, revived in the name of May Taylor, as administratrix in succession. (Record, p. 133.)

The judgment of the Crawford Circuit Court was, by the Supreme Court of the State of Arkansas, affirmed. (Record, p. 134.) The present cause comes to this Court by writ of error to the Supreme Court of Arkansas.

THE ASSIGNMENTS OF ERROR appear in the record, pages 151 to 156. The assignments on which the plaintiff in error relies are those hereinafter particularly discussed.

ARGUMENT.

The jurisdiction of this Court to hear and determine this cause must depend upon the substantial character of the Federal questions presented by the pleadings, and such Federal questions as it clearly and fully presented throughout the entire trial of this cause at *nisi prius*, and at its

ultimate hearing in the court of last resort for the State of Arkansas. These Federal questions were first set forth by the defendant in error in his original complaint and constantly engaged the attention of the trial and appellate courts at every stage of the proceeding until the cause stood affirmed by the Supreme Court of the State.

ACT OF CONGRESS OF MARCH 2ND, 1893.

No more important Act of Congress relative to railroads and their management has ever been passed by Congress than the Act approved March 2nd, 1893. The proper interpretation of this Act has often engaged the attention of the best minds of the country. Lawyers and laymen have spent much time, and thought in an effort to solve its various provisions. The American Railway Association and the Interstate Commerce Commission, both of which were called into consultation prior to its enactment, have subsequent to that time sought to construe its various provisions and this Court, amongst others, has several times sat in solemn judgment upon the meaning of various clauses and phraseology.

If the construction insisted upon by the plaintiff in error was proper, then the defendant in error should have lost his cause in the Court below. Counsel for the defendant in error, in his brief in support of the motion to dismiss or affirm (pages 23 and 24) seems to urge that this Court can take jurisdiction of a cause coming from a State Court only where the *validity* of an Act of Congress is drawn into question—that when the plaintiff in error concedes the "*validity*" of the Act of Congress, such party cannot invoke the judgment of this court for the purpose of having

that Act properly construed. Certainly this position is untenable.

An Act of Congress may be ever so valid and far-reaching in its character and yet, according to the learned counsel for the defendant in error, the Supreme Court of the United States must stand powerless to speak forth its proper interpretation, when a suit under that Act is determined in a State Court and the Act is improperly construed by the State Court. Such a view cannot be upheld. No more important question can ever arise for the determination of this Court, than the proper interpretation of the laws of the Congress of the United States; and whenever there is a controversy as to the proper interpretation of such laws—whenever a party to a suit which has arisen under the laws of Congress asserts a right or claims an *immunity*, which will be upheld by one interpretation or defeated by another interpretation of a particular Act of Congress, then there is presented a proper Federal question for the determination of this Court.

WHAT IS A FEDERAL QUESTION?

"Three classes of cases are reviewable by the Supreme Court on a writ of error to a State Court:

(1) There must have been drawn in question the validity of a treaty, order or statute or an authority exercised in the United States, and the decision must have been against the claim to maintain which either was relied upon;

(2) Or there must have been drawn in question a statute or order, or authority exercised in the State upon the ground of repugnancy to the Constitution or a law or a treaty of the United States, and the decision must have

been in favor of the validity of the State law or authority in question;

(3) Or a title right privilege or immunity must have been claimed under the Constitution or law, or a treaty of or by virtue of commission held or authority exercised by the United States, and the decision must have been against the right so claimed.

Home Insurance Company v. Augusta, 93 U. S. S. 116.

A case may be considered to arise under the Constitution or a law of the United States whenever its *correct decision* depends upon the construction of either.

Cohen v. Virginia, 6 Wheat., 375.

Or whenever the rights set up by a party may be defeated by the one construction or sustained by the opposite construction.

Osborne v. Bank of the United States, 9 Wheat. 738.

"The right of the Supreme Court to review the final decision of the highest Court of the State extends to cases where any right, title, privilege or immunity is claimed under the Constitution or treaty or statute of, or commission held or authority exercised under the authority of the United States and the decision is adverse. The jurisdiction of the Court under this section is not confined to rights created by the Constitution or a treaty, but extends to rights protected by the Constitution, treaty or laws of the United States from whatever source these arise or may spring.

New Orleans v. DeArmas, 9 Pet. 224.

"Where a party relies upon an Act of Congress and the questions construed by the Court and upon which the case turned were whether the party had brought himself within the scope of that Act, a Federal question is presented.

San Jose Land & Water Company v. San Jose Ranch Company, 189 U. S. 177.

No good purpose can be served by further citation of authority upon this proposition.

FEDERAL QUESTIONS PRESENTED BY THIS RECORD.

I.

The accident which gave rise to this suit occurred in the Indian Territory. Prior to the passage of the Act of Congress placing in force in the Indian Territory certain portions of Mansfield's Digest of the Statutes of the State of Arkansas, only the common law was in force in the Indian Territory (Act of May 2nd, 1880, 26 Stats., L 94), and under the common law no cause of action arose for a death by wrongful act. In other words, until the Congress of the United States enacted that certain portions of the law of the State of Arkansas, including in a more or less modified form Lord Campbell's Act, be put in force in that portion of the United States known as the Indian Territory, no suit could be maintained for the loss of a life by negligence, however gross. This Act of Congress was passed prior to the death of Taylor and the institution of this suit. Then certainly this cause of action arose specifically under a law of the Congress of the United States.

When the defendant in error closed his testimony, the plaintiff in error moved the Court to direct a verdict in its favor on the ground that there was no testimony to justify a finding adverse to the plaintiff in error (R. 73). This motion was overruled by the Court and the plaintiff in error saved its exception. This action of the trial court was upheld by the Supreme Court of the State of Arkansas when this cause was affirmed.

This motion for a verdict struck at the very vitals of the right of the defendant in error to recover in this suit. It challenged the jurisdiction of the Court for the reason that the testimony showed that the accident which gave rise to the cause of action occurred in the Indian Territory and the suit was being maintained in the State of Arkansas. The Congress of the United States had provided courts in the Indian Territory to try causes of action arising there. The defendant in error sought by force of *comity* to have this cause of action, plainly triable in United States Courts in the Indian Territory, heard and determined in the State of Arkansas. Plaintiff in error urged that comity only moved between sovereigns and a suit for which the original jurisdiction rested with the Federal Court could not by force of *comity* be maintained in a State Court or *vice versa*.

Instructions Nos. 18, 19, 20 and 21 (R. 125 and 126) were asked for by the plaintiff in error and were refused by the trial Court. These instructions sought to differentiate this trial, which should have occurred in the Indian Territory and in the United States Court there organized and existing, from the procedure which should properly obtain in the *nisi prius* Courts of the State of Arkansas.

II.

A FEDERAL QUESTION WAS PRESENTED, BOLDLY AND CLEARLY WHEN THE PLAINTIFF IN ERROR MOVED AT THE CLOSE OF ALL THE TESTIMONY IN THE CASE (R.119) FOR A VERDICT IN ITS FAVOR ON THE GROUND THAT THE CONGRESS OF THE UNITED STATES HAD NOT PASSED A VALID LAW REQUIRING RAILROADS OF THE UNITED STATES ENGAGED IN INTERSTATE COMMERCE TO EQUIP THEIR CARS WITH COUPLERS OF UNIFORM AND STANDARD HEIGHT.

By reference to the Act of the Congress of the United States, familiarly known as the "Safety Appliance Act," approved March 2nd, 1893 (27 Statutes at Large, 531), it will be noticed that the Congress of the United States specifically provided for "Power driving-wheel brake and appliances for operating the train-brake system," and for having a sufficient number of cars in each train so equipped "that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand-brake for that purpose;" for cars used in moving interstate traffic to have "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars;" for "secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

But when the Congress undertook to make provisions for the uniform and standard height of draw-bars of cars to be used in interstate traffic; it seemed to have no information on this subject, *and provided that within a given number of days the American Railway Association should*

designate to the Interstate Commerce Commission what should be the standard height of the draw-bars for such cars, and what should be the maximum variation from such standard height on account of empty and loaded cars. (Sec. 27 Statutes at Large, p. 531.) In other words the Congress of the United States, seeking to proceed under the grant of powers conferred upon it by the Constitution of the United States, and while dealing, not with the local law, not with the enactment of a provision determinable by local option, but while dealing with the momentous problem of interstate traffic, which problem is co-extensive with the territorial limits of the United States of America, and after it had made specific provisions for a number of things looking to the promotion of the safety of the employees of railroads engaged in interstate commerce, and at a time when it possessed all means adequate to determining what should be the height of draw-bars, paused, so to speak, in the performance of its duty, and undertook to *delegate the determination of this substantative and very vital provision,* first, to the *American Railway Association* and, second, to the *Interstate Commerce Commission.*

We maintain that this procedure upon the part of the Congress of the United States was unwarranted, and from the standpoint of constitutional law, cannot be upheld. The Constitution of the United States conferred upon the Congress the power of regulating commerce between the states. This constituted a specific grant of power to the legislative branch of the Federal Government; and while the Congress of the United States might enact any proper provision, tending to regulate, equalize or promote the facilities of interstate commerce, or the means and agencies by which it

was carried on, it cannot, we urge, *delegate the power of enactment* to any association, tribunal or commission of men.

This being true, that portion of the Act of Congress above referred to, which seeks to establish uniform and standard heights of draw-bars, is a nullity and of no binding force or effect upon anyone. When we seek to ascertain the provisions of Congress with respect to automatic couplers, air brakes, train brake system, and grab-irons or hand-holds, we find those provisions plainly set forth in the statutes of the Congress of the United States of America; but when we undertake to ascertain what provision, if any, is made for uniform and standard height of draw-bars, we must look, first to the statutes of the Congress of the United States; second, to the minutes of the meeting of the American Railway Associaion; and, third, to the records of the Interstate Commerce Commission to ascertain whether any provision has been made for such uniform and standard height. Can it be said that one of these provisions is more important than another? Will it be urged that the Congress of the United States could have lawfully delegated this whole subject of "safety appliances," first, to the American Railway Association; and, second, to the Interstate Commerce Commission of the United States? If so, might it not as well delegate every other subject relative to interstate commerce to some specially selected body of men for the initiative; and, second, to the Interstate Commission for final enactment? This species of procedure by the Congress of the United States must not be confused with that other system of legislative enactment whereby it has been held that the Legislatiure of a State may delegate

to the Court the determination of some facts or state of facts upon which a given law may take effect. It must be remembered that this species of procedure at the hands of the State Legislature has never been justified upon any other grounds than the doctrine of *local condition* or *local option;* that it has only been applied where the Legislature sought to create an enactment with respect to local territory, and where it became necessary, or at least desirable, to ascertain the local will.

Here the Congress of the United States was seeking to exercise the power *granted* to it by the Constitution of the United States for the purpose of regulating the great and general subject of interstate commerce; a subject which, as we have above said, was co-extensive with the territorial limits of the United States, not local to one part more than another, but which might well be subject, throughout the entire governmental jurisdiction, to any wholesome legislative provision of the Federal Congress.

Our contention, in brief, is that the Congress of the United States alone has the power to provide for uniform and standard height of draw-bars; that this power was exclusively in the Congress, and could not be delegated to any other association, commission or agency. When it came to making provision for uniform and standard height of draw-bars it was the duty of the Congress to ascertain from any source it desired to use—the American Railway Association—the Interstate Commerce Commission—the Master Car Builder's Association—or any number of those railway managers who may be found in any State of the Union —what that uniform and standard height should be, and then provide by specific enactment for its establishment,

just as it did with regard to automatic couplers, air brakes, train brake system, and grab-irons. Having failed to do this, we maintain that this provision has fallen entirely outside the congressional enactment, and is no more enforcible in the Courts than if the subject had never engaged the attention of the Congress at all.

See

Cooley on Constitutional Limitations, 5th Edition, p. 139 *et seq.*

Dillon on Municipal Corporations, 4th Edition, Vol. 1, p. 78, Sec. 44.

Barto v. *Himrod,* 8 N. Y., 483.

Here then was certainly raised a very important Federal question as to whether or not the very provision upon which the defendant in error founded her cause of action was in fact a valid law of the Congress of the United States.

III.

THE FIRST INSTRUCTION GIVEN BY THE TRIAL COURT AND FINALLY APPROVED BY THE SUPREME COURT OF THE STATE OF ARKANSAS PRESENTS A VERY ERRONEOUS INTERPRETATION OF WHAT IS MEANT BY UNIFORM AND STANDARD HEIGHT OF DRAW-BARS. THAT INSTRUCTION IS AS FOLLOWS:

> "The Act of Congress fixes the height of loaded cars engaged in interstate commerce on standard gauge railroads at 31½ inches and unloaded cars at 34½ inches measure perpendicularly from the level of the rails to the centers of the draw-bars and this variation of three inches in height is intended to allow the difference in height caused by loading the cars to the full capacity, or by loading it partially, or by its being car-

> ried in the train when it is empty. Now the law required that the two cars between which Taylor lost his life should be when unloaded of equal and uniform height from the level of the face of the rails to the center of the draw-bars of 34½ inches, and when loaded to the full capacity should be of the uniform height of 31½ inches.....(R. 120).

This instruction is clearly erroneous and does not give a proper interpretation of the Act of Congress upon which the defendant in error relied for her recovery.

The American Railway Association thus certified to the Interstate Commission the standard height.

> "The standard height of draw bars for freight cars, measured perpendicularly, from the level of the tops of the rails to the centres of the drawbars for standard gauge railroads in the United States shall be thirty-four and one-half inches and the maximum variations from such standard heights to be allowed between the draw bars of empty and loaded cars shall be three inches."

This standard thus fixed by the American Railway Association was certified, and notice given to all the Interstate carriers in the United States. It will be observed that this does not fix the standard height of the draw bars of loaded cars, nor does it fix the standard height of the draw bars of freight cars not loaded. But it does fix a standard height of the draw bars for freight cars at 34½ inches, and provides that the maximum variation from such standard height as between the draw bars of empty cars, and loaded cars shall be three inches.

The question submitted by the instruction to the jury

was the height of the centres of the drawbars of the two cars which Taylor was seeking to couple, and the jury were instructed by this first instruction that the height of the draw-bars of these freight cars when unloaded must be 34½ inches, and when loaded to the full capacity, 31½ inches, and the jury were in effect told that if they were not thus of equal and uniform height, according to that standard, that the defendant was guilty of a violation of a duty fixed by this act, and that that was negligence, and if this cause was contributory to the death of Taylor, that a verdict should be rendered in favor of plaintiff providing Taylor himself was free from contributory negligence.

When it is remembered that the proof showed that one of these cars was loaded to its full capacity, and the other had a load of from one-half to two-thirds of its capacity, the charge was very misleading, particularly when in connection therewith the Court refused to charge as to the meaning of the act, as requested by the defendant, when one car is partially loaded and the other is fully loaded, as in Request No. 28; that in such case,

> "The law allows a variation of full three inches between the centres of the draw-bars of such cars, without regard to the amount of weight in partially loaded cars," and the injury resulting from this to the defendant is shown by the fact that the testimony no where indicates that the variation of three inches was exceeded. The testimony of plaintiff's witnesses upon this subject is as follows:
>
> Charles Lattin:
>
> "You say the cars were in three or four feet of each other when he raised the link?
>
> A. A short distance away, I should judge three or four feet.

Q. Did you observe the condition of the draw-heads at that time?

A. I could not very much from the top of the cars. Of course I saw the draw-heads looking down on them.

Q. If either one appeared tc be higher than the other, state which one it was.

A. The automatic appeared to be higher, because it was wider from my position on top of the car.

Q. How much higher did it appear? A. I do not know.

Q. How did that common draw-bar appear to you as to the relative height of the other bar?

A. I cannot tell exactly. I was looking right down upon it. I cannot tell at all.

Q. How did it appear to you Mr. Latlin from your best recollection?

A. It appeared to be lower on account of the other one being thickest.

Q. Which one?

A. It appeared to be lower on account of the other one being the thickest.

Q. Which one?

A. The common draw-bar.

Q. Appeared to be lower?

A. I cannot tell exactly.

Q. Which one appeared to be lower to you?

A. The common draw-bar on account of the automatic. I suppose being higher and having a wider face upon it.

Q. In inches or feet or distance of some kind, which one of the draw-bars appeared to you to be the higher?

A. You speak from the draft line?

Q. From the centre of the draw-bar.

A. The centre of the draw-bars. I do not know. I could not see the centre of the draw-bar.

Q. Which one appeared to be highest?

A. I said before, the automatic coupler appeared to be the highest, because it had a thicker face.

Q. How much higher did it appear to be.

A. I cannot tell you.

Q. About how much higher?

A. I cannot answer that.

Q. You did answer it once.

A. It may be an inch, or two inches or three inches.

Q. Did it appear to be two or three inches higher?

A. I did not say it appeared to be two or three inches higher.

Q. About?

A. The difference in the height of the draw-heads I cannot say, how much. I do not like to answer that question. I do not know how much.

Q. How much would you say?

A. I say an inch and a half or two inches. Somewhere between an inch and two inches.

A. That is my recollection of it."

(Record, pp. 48 and 49.)

On cross-examination the same witness was asked:

Q. Can you tell the jury whether there was any difference in the heights of the centres of the draft lines between these two cars before they came together?

A. No, sir, I cannot.

* * * *

Q. You can not tell the jury whether there was any difference at all between the heights of the draft lines of these two cars?

A. No, sir.

(Record, p. 54.)

The testimony of Joe Curtis was to the effect that in making up this train at Van Buren (one of the points where the train was made up), there was some trouble in coupling one of the cars, which was set out on the side track with one of the cars which Taylor was attempting to couple when he was killed, and that there was a difference of about three or four inches between these two cars (See Record, p. 64), but Curtis was wholly unable to testify as to whether there was any difference between the draw-bars of the two cars which Taylor was attempting to couple when he was killed. He says on cross-examination respecting them:

> "Q. Can you tell the jury whether there was any difference at all in the link and pin car which was in front and the Sallisaw car and the car which was behind the Sallisaw car?
>
> A. No, sir; I cannot do that."

(Record, p. 67.)

The two cars referred to in the foregoing question and answer were the cars which Taylor was attempting to couple. The Sallisaw car was the car which was cut out of the train, and shifted on to the side track before the accident to Taylor.

In this connection also as showing the manner in which the jury were confined to a false issue, it is proper to call the attention to the testimony of the defendant, as to the height of the draw-bars on the two cars involved in this controversy.

The testimony of W. H. McPherson is to the effect that about three hours after the accident the cars between which Taylor was killed were yet standing on the track, and that he measured the exact distance of the centre of the draw-

bars above the top of the rail and found in the Missouri Pacific car, 12,224, the distance of the draw was 33½ inches from the top of the car to the centre of the rail. That in the St. Louis, Iron Mountain and Southern car, 11,962, the measurement was 32½ inches.

M. D. Sanders testified that within a few minutes after Taylor was killed he made the same measurements and found the Missouri Pacific car 12,224 was 33½ inches above the top of the rail, and the Iron Mountain car 11,962 32½ inches above the top of the rail, a difference of just one inch. (See record, p. 104.)

In view of this state of the record, Instruction No. 1, given by the Court was extremely misleading, and did not present the real meaning of the Act of Congress. Upon this question the majority of the Supreme Court of Arkansas were of opinion that Instruction No. 2 corrected the error given in Instruction No. 1. But we submit that that is not so, because in the first sentence of Instruction No. 2, the difference in the height of the centre of the draw-bars in the two cars is the difference as defined in Instruction No. 1, and was a difference of three inches in the standard heights fixed by the Act of Congress between loaded and empty cars. That was the only difference which was submitted to the jury by the first instruction, and the second instruction embodied that and referred to that and nothing else. In other words, Instruction No. 1 confined the jury to the consideration of the question of whether these two cars were constructed so as to be of a uniform height of 34½ inches, when empty, or of 31½ inches when loaded to the full capacity and directed the jury, what was the effect of their findings, if they found that there was a variation in the cars in these particulars.

The plaintiff in error sought to have this instruction modified and the law properly given by requesting the trial Court to charge as follows (Request 26):

> "By center of the draw-bar is meant the center of the draw-bar shank or the center of the draft line of the draw-bar." And (Request 27), "By standard height is meant from 31½ inches to 34½ inches measured perpendicularly from the face of the rail to the center of the draft line in the draw-bar." (Request 27.) "Cars are of uniform and standard height when the centers of the draw-bar shanks are no less than 31½ inches or more than 34½ inches measured perpendicularly from the face of the rail." And (Request 27), "The Court charges you that the Act of Congress allows a variation in height of three inches between the centers of the draw-bars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurements of such height to be made perpendicularly from the top of the rail to the center of the draw-bar shank or draft line." (Request 28.) "The Court charges you that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centers of the draw-bars of such cars, without regard to the amount of weight in the partially loaded car." And (Request 29), "Before the plaintiff can recover in this case, he must show by a preponderance of the testimony that there was more than three inches difference in the height between the centers of the draft lines in the draw-bars in the cars between which Taylor lost his life, and that such difference if it existed, was the proximate or producing cause of his death; or that it contributed along with other causes aside from the deceased's own conduct to produce such death." (Record, p. 127.)

All of these requests by the plaintiff in error for instructions embodying a proper interpretation of the Act of Congress relied upon by the defendant in error were refused by the Court, and the plaintiff in error was forced to go to trial before the jury on the interpretation of the law as given by the trial Court in its first instruction, and this action of the trial Court was upheld by the Supreme Court of the State of Arkansas, and is now assigned as error.

The Supreme Court of the State of Arkansas in its first opinion in this case (Record, 137), in upholding the instruction of the trial Court as herein set out, said:

> "Counsel for appellant contend that there is no evidence to show that the centers of the draft lines of the drawheads of these two cars were not even, and therefore no evidence to show that the variation in the draft lines of these two cars was more than that permitted by the Act of Congress. But the Act of Congress does not require that the draft line of the cars used in interstate commerce should be even, but requires that the centers of the draw-bars should be of the standard and uniform height mentioned in the Act. The Act says nothing about draft line but requires that the centers of the draw-bars should be of uniform height with the exception that a variation is permitted between loaded and unloaded cars. For this reason the failure to show what the variation was between the centers of the draft line of the draw-bars on these two cars was not mentioned (material)."

The testimony in this case (R. 53), showed that in railroading when you speak of the center of the draw-bar you mean center of the draw-bar shank or draft line.

By turning to the Tenth Annual Report of the Interstate Commerce Commission, 1896, on page 94, you will find the following:

"Attention was called in our last annual report to an apparent misunderstanding among some of the carriers as to the precise meaning of the language used by the American Railway Association, acting under authority conferred by Section 5 of the Act, in fixing the standard height of the draw-bars and the variation to be allowed therefrom as between empty and loaded cars. This Association has since explained its understanding in regard to the standard height for draw-bars on standard gauge railroads as follows:

"The standard height of draw-bars for freight cars measured perpendicularly from the level of the top of the rails to the center of draw-bars is 34½ inches with no greater variation allowable than three inches, minimum height 31½ inches.

"*By centers of drawbars is meant the horizontal line through the center of the draw-bar shank.* 34½ inches is the standard maximum height, from which there can only be a variation of three inches downward."

Here now is a clear, direct announcement of the American Railway Association, which recommended the heights adopted by the Interstate Commerce Commission, which promulgate to the railroads and to the country generally its own approval and adoption of the heights recommended. Why, then, should the Supreme Court of the State of Arkansas adopt a different interpretation? Was that Court possessed of specific expert knowledge to promulgate another and better interpretation of the meaning of uniform and standard height?

If the Courts of the States of Arkansas, before which came this cause, had given this interpretation to the Act of Congress relied upon, the defendant in error would have

at once lost his cause. All of the testimony in the record shows that there was no difference between the draft lines of the two cars between which Taylor lost his life.

Moreover, the trial Court laid special stress upon the difference allowable between *loaded and unloaded cars.*

Now, the American Railway Association and the Interstate Commerce Commission, when they come to interpret the variation allowable between standard height drawbars, say nothing whatever about loaded and unloaded cars. In other words, the Act of Congress means that whether the car be loaded to its full capacity, or partially loaded, or empty, there is allowable *at all times* a variation of three inches.

It will be impossible to maintain these drawbars at exactly a uniform height of 31½ inches when loaded and 34½ inches when empty.

At page 92 of the record a witness was asked: "If a car is first built and adjusted to the proper height, what will lower the height from time to time?"

> A. "Several things. The wearing of the journal will lower it, the wearing of the brass will lower it; the wearing of the wheel will lower it, and the loading of the car will press on the springs and the compressing of the springs will lower it, and the general wear and tear will drop it a little bit lower."
>
> Q. "Will the sinking of the bolts in the draft timbers lower the carrying iron?"
>
> A. "Yes, sir."
>
> Q. "That will lower the drawbar?"
>
> A. "Yes, sir."
>
> Q. "Is it not a fact that anything which will lower the body of the car will lower the drawbar?"
>
> A. "Yes, sir."

Q. "Mr. Bosshardt, has the company provided any means to keep these drawbars up to the standard height when this wear and tear takes place?"

A. "Yes, sir."

Q. "What has it done?"

A. "They use what is known as raising-shims."

Q. "What are they?"

A. "Shims are iron—you raise the coupler and drop it over the carrying iron. They are an inch and a half thick, and all car inspectors and car repairers are supplied with a supply of them."

It will appear from this that all railroad men clearly understand what was meant by uniform and standard height and what it refererd to and what provisions had been made to maintain it, and yet with all of this testimony in this record, the trial Court and the Supreme Court of the State of Arkansas interpreted the Act of Congress entirely and radically different from the interpretations placed upon it by the American Railway Association and the Interstate Commerce Commission and by all the railway employees who testified in this case. This erroneous interpretation of the Act of Congress was prejudicial to the plaintiff in error.

IV.

THE COURT ERRED IN REFUSING TO CHARGE AS REQUESTED BY THE DEFENDANT BELOW IN ITS REQUEST NO. 23.

The plaintiff in error asked the Court to charge the jury as follows (R. 126):

"The Court tells you that if you find from the evidence in this case that the defendant equipped all its cars with uniform and standard height drawbars when such cars are first built and turned out of the shops, then the defendant is only bound to use ordinary care

to maintain such drawbars at the uniform and standard height mentioned in the testimony."

The Court refused to give this instruction, held the plaintiff in error imperatively bound to equip and *maintain* its cars at all times and under all circumstances with uniform and standard height drawbars, and this too in the fact of a record which showed the utter impossibility of such equipment and maintenance.

(See testimony of Bosshardt hereinbefore referred to.)

Again (R. 99) the following question was asked:

Q. "After a car is built to standard and the drawbar of standard height, what things will affect it so as to lower the drawbar from time to time?"

A. "Quite a number of different causes for lowering a drawbar. A brass wearing will let the drawbar down, the wearing of the journal will lower it, weak springs after it has been in service for a long time will lower it. Anything that will lower the body of the car will lower it. Then sometimes the draft timbers will lower it some caused from different causes. Sometimes the bolts will pull down in the draft sills; sometimes the carrying iron bolts that hold the carrying iron in the dead wood will pull down in the dead wood a little, and sometimes the nuts or taps on the bolts will turn down a little."

Q. "All of these things will have a tendency to lower it?"

A. "Yes, sir."

Q. "What provision has the company made to meet this constant lowering?"

A. "One provision is to take the cars into the repair track when found below the standard height, if they need no other repairs generally raise the coupler

up and put in another draft timber; sometimes cut out the draft timber a little on the bottom and raise the carrying iron. Usually when in service they furnish what we call a cast raising iron. That is what we usually term it."

Q. "Same thing as a shim?"

A. "It is a shim. Fits down over the carrying iron like this, and the coupler rests on top of it and holds it on top of the carrying iron."

And again (R. 60):

Q. "Where did you keep shims?"

A. "We had a supply in the caboose. They furnished them to us."

Q. "What was the object in that?"

A. "To keep the drawheads raised up."

Q. "To keep them in uniform and standard height?"

A. "Yes, sir."

Q. "You were furnished a supply in the caboose?"

A. "Yes, sir."

Q. "If you find a drawbar that has dropped down for any reason while in transit, what is your duty?"

A. "Shim it up. Put a shim under it and bring it up to standrad height."

Q. "How long does it take to put one of these shims in?"

A. "Sometimes you can put one in in a half a minute and sometimes it takes two or three minutes, owing to the condition of the car, if you don't have to cut the train to put them under."

Now, it will be seen from the record in this case that the railroad witnesses understood thoroughly what was

meant by uniform and standard height—that the railroad company understood what was meant by uniform and standard height, and it made ample provision for maintaining that uniform and standard height by the furnishing to its train crews of a supply of metallic shims to be placed over the carrying irons so as to raise the drawbars sufficiently to meet the requirements of the Act of Congress. The Supreme Court of the State of Arkansas upheld the trial Court's interpretation of this Act of Congress and held the railroad company to arbitrarily maintain its drawbars at uniform and standard height regardless of the showing made in this record.

The Supreme Court of the State of Arkansas said (R. 137):

> "Again counsel for appellant contends that if it be admitted that the drawbars were defective, still there is no evidence that the defendant had notice of the defect, and that upon that ground plaintiff failed to make out his case. It is true that as a general rule the master is only bound to use ordinary care to provide suitable and safe machinery for the servant and is liable for damages caused by defective machinery only when the defect is the result of negligence on his part, as when he neglected to repair the defect after having notice of the same, or when by the use of ordinary care he should have known that the machinery or appliances were defective. In such cases the plaintiff must show knowledge of the defect on the part of the master or that its lack of knowledge was due to negligence, for the mere fact of any injury caused by a defect does not of itself make out a case of negligence. But it is different when the injury is caused by a violation of a statutory duty on the part of the master. The statute upon which this case is based does not say that the company shall use ordinary care to provide their cars with

drawbars of a certain height but it imposes as a positive duty upon the railroad company that they shall do so."

We respectfully urge that this interpretation of this very important Federal Statute was wrong—was radically wrong, and that it presents for the determination of this Court a Federal question of grave importance to all the railroads in the United States.

The plaintiff in error sought further to be relieved from this erroneous interpretation of the Act of Congress by requesting the following instruction (R. 153):

> "If you find from the evidence in this case that, although the drawbar may be adjusted to the standard height when the car is first built and turned out of the shops, that the every day wear and tear of the car continually lower the drawbar, that the defendant, in order to provide against the lowering of the drawbar provides an ample supply of shims ready to the hand of the trainmen and car inspectors, which may be readily and in a very short time placed under the drawbars so as to restore them to uniform and standard height, then the Court tells you that the master has fully performed his duty, and if there was any failure of the train men, switching crew or car inspectors to use these shims so provided, such failure was the failure of a fellow servant with the deceased and you should find for the defendant."

The trial Court of Arkansas refused this instruction and the Supreme Court of the State of Arkansas upheld that refusal.

This instruction clearly states the law applicable to this case. The accident in which Taylor lost his life occurred in the Indian Territory, where all the trainmen and

car inspectors were held under the law to be fellow servants with Taylor, the brakeman. The record shows clearly that the company had built and equipped its cars to standard measurements and with standard height drawbars, as required by the Act of Congress, and then knowing that the every day handling of the car would tend to lower the drawbar, it had provided its train men and car inspectors with an ample supply of shims or devices for maintaining the standard height of drawbars. These shims it had placed in the caboose of the train upon which Taylor was called to perform his duty, and if there was a lack of uniform and standard height drawbars, this lack could be overcome in from one-half minute to two or three minutes by the trainmen or car inspector simply raising the drawbar and placing the metallic shim over the carrying iron.

We respectfully maintain that the instructions asked for and refused by the trial Court were clearly within the terms of the Act of Congress when properly interpreted, and that had they been given the plaintiff in error would have been discharged from the Court without liability or amercement.

The last opinion delivered in this case by the Supreme court of the State of Arkansas is unique in many respects and upholds by a divided Court the former opinion of that Court in its interpretation of this very important Act of Congress. The dissenting opinion of Mr. Justice Battle (R. 144), concludes as follows:

> "The evidence as to the issues in this case is unsatisfactory. To have avoided prejudice, the instructions to the jury should have been accurate, clear and unambiguous. The instructions we have considered do not meet this requirement and were prejudicial."

JOHN F. DILLON,
RUSH TAGGART,
Attorneys for Plaintiff in Error.

APPENDIX.

ACT MARCH , 1893, c. 196.

An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes and Their Locomotives with Driving Wheel Brakes, and for Other Purposes.

An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes and Their Locomotives with Driving Wheel Brakes, and for Other Purposes.

DRIVING-WHEEL BRAKES, AND APPLIANCES FOR OPERATING TRAIN-BRAKE SYSTEM.

Be it enacted, &c., That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Act March 2, 1893, Sec. 1, 27, Stat. 531.

AUTOMATIC COUPLERS ON CARS.

Sec. 2. That on and after the first day of January, eighteen ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped

with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Act March 2, 1893, c. 196, Sec. 2, 27 Stat. 531.

COMPANIES COMPLYING, ETC., *May* REFUSE INSUFFICIENTLY EQUIPPED CARS FROM CONNECTING LINES.

Sec. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power of train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

Act March 2, 1893, c. 196, Sec. 3, 27 Stat. 531.

GRAB IRONS, ETC.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

DETERMINATION OF STANDARD HEIGHT OF DRAWBARS FOR FREIGHT CARS; CERTIFICATE OF NOTICE; NON-COMPLYING CARS EXCLUDED FROM TRAFFIC.

Sec. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission

the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Act March 2, 1893, c. 196, §5, 27 Stat. 531.

FAILURE TO EQUIP CARS; PENALTY; DUTY OF DISTRICT ATTORNEYS AND OF INTERSTATE COMMERCE COMMISSION.

SEC. 6. That any such common carrier using any locomotive, engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the district court of the United States having jurisdiction in the locality where such viola-

tion shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: Provided, That nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Act March 2, 1893, c. 196, Sec. 6, 27 Stat. 532.

EXTENSION OF TIME FOR COMPLIANCE WITH ACT.

Sec. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this Act.

Act March 2, 1893, c. 196, Sec. 7, 27 Stat. 532.

EMPLOYEES INJURED BY CARS, ETC., NOT HAVING REQUISITE EQUIPMENTS, DEEMED NOT TO HAVE ASSUMED RISK.

Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Act March 2, 1893, c. 196, Sec. 8, 27 Stat. 532.